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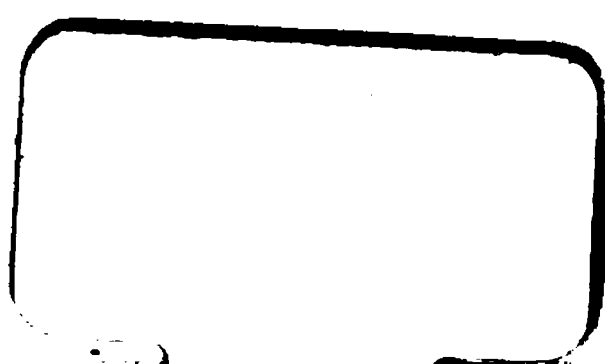
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REPORTS
OF
CASES IN BANKRUPTCY,
ARGUED AND DETERMINED
IN
THE COURT OF REVIEW,
AND ON
APPEAL BEFORE THE LORD CHANCELLOR.

By EDWARD E. DEACON AND EDWARD CHITTY, Esqrs.
BARRISTERS AT LAW.

VOL. III.

LONDON:
SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43, FLEET-STREET.

1835.

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CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

The Court of Review, &c.

Ex parte SHUTE and others.—In the matter of
SHUTE.

1833.

Westminster,
January 26.

THIS was the petition of the bankrupt's wife and children, for the proof of a sum of 1200*l.*, under the following circumstances.

The bankrupt, upon his marriage, executed a bond to *R. Watson* and *H. Davy*, conditioned to pay to them, when required, 1200*l.*, which, with the consent of the bankrupt and his intended wife, or the survivor of them, was to be placed out at interest, and applied upon the following trusts: first, the whole interest to go to the bankrupt for life, if he should so long continue in good and solvent circumstances, *and not become a bankrupt*, or make any assignment of his effects for the benefit of his creditors; remainder to his in-

A bankrupt had, on his marriage, entered into a bond to trustees to pay them 1200*l.*, upon trust for himself for life, if he should not become a bankrupt, with remainder to his intended wife for life, with the usual limitations to children; and on the faith of the bond, he was permitted to apply to his own use his wife's marriage

portion, amounting to 150*l.*: Held, that the trustees were entitled to prove for the 1200*l.*; the dividends to be invested in stock, the dividend of which was to be subject to the payment of interest to the wife on the 150*l.*, and the remainder to the bankrupt's creditors for his life, and after his death, upon the trusts of the bond.

1833.

Ex parte
SHUTE
and others.

tended wife and her assigns during her life, with the usual limitations to the children of the marriage. The marriage afterwards took effect; and, on the faith of the bond, the bankrupt was permitted to receive and apply to his own use the sum of 150*l.*, as the marriage portion of his wife.

The infant petitioners were the only issue of the marriage. *Watson*, one of the trustees, on the 30th June 1832, wrote to the bankrupt as follows:—"As the trustee for your wife and family, I request you to make immediate payment of a sum of 1200*l.*, secured to myself and co-trustee by your bond, dated the 3rd December 1816." This letter was delivered to the bankrupt on the 2d July, at his own house, before eleven o'clock in the morning. On the same day the fiat was issued; but it did not appear, that the 1200*l.* had been previously demanded. The trustees applied to prove the amount under the fiat, but the commissioners rejected the proof, holding that the bond was a fraud upon the bankrupt laws.

The prayer was, therefore, that a proof might be admitted for the 1200*l.* secured by the bond, in the name of some person appointed by the Court on behalf of the petitioners and the surviving trustee; and that the dividends in respect of such proof might be invested according to the trusts of the bond, or might be otherwise paid and secured as the Court should direct.

Mr. Swanston, for the petitioners. The decision of the Commissioners cannot be supported. The question is, whether the dividends upon this sum are to be paid and applied for the benefit of the wife, according

to the equitable provision she is entitled to under the bond,—or to the assignees, for the benefit of the creditors. We ask for an order that the dividends upon the whole sum may accumulate, until the provision for the bankrupt's wife shall be secured. *Ex parte Turpin*(a) is an authority that proof may be made for the whole sum.

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Mr. Twiss, for the assignees. This case is distinguishable from that of *Ex parte Turpin*(a), inasmuch as the first part of this settlement is bad, and is a fraud upon the bankrupt laws. There were no such terms as these in *Ex parte Turpin*. In this case the wife is only entitled to the dividends arising from the 150l.; the settlement as to the remainder of the 1200l. being bad. [Sir J. Cross. As the limitation is not to pay the interest to the *separate use* of the wife, it must go to the husband.] Even if the limitation had been to the separate use of the wife, the limitation would have been bad, as it was contingent on the husband's bankruptcy; *Ex parte Meaghan*(b), *Ex parte Oxley*(c). [Erskine, C. J. The question is, whether the dividends on the 1050l. are to go to make up the full sum of 150l., to which the wife is clearly entitled; or whether this case is not in that respect distinguishable from *Ex parte Turpin*.] [Sir G. Rose referred to the case of *Ex parte Hodgson*(d), and observed, that wherever there is a breach of trust by a bankrupt as to a trust fund, the whole fund must be made good before any thing can be divided among the creditors.] The wife cannot

(a) 1 Dea. & Ch. 120.

(b) 1 Sch. & Lef. 179.

(c) 1 Ball & Bea. 257.

(d) 19 Ves. 206.

1833.

Ex parte
SHUTE
and others.

take any interest out of that which was her husband's, but only out of that which was her own; *Ex parte Hill*(a). If the settlement as to the 1050*l.* is void, then the limitation for the benefit of the wife can take no effect. There is this distinction between this case and that of *Ex parte Turpin*; in that case the limitation was good, but in this it is wholly void. It is proposed, therefore, that the interest on the dividends of the 150*l.* should accumulate for the wife; and that the interest on the dividends of 1050*l.* should be paid to the assignees during the life of the bankrupt, and upon his death should accumulate and be applied upon the trusts of the settlement.

Mr. *Swanston*, in reply. It is conceded, that the trustees must prove for the 1200*l.*; and it is also not disputed, that the settlement is good for the 150*l.* belonging to the wife, though bad for the remainder; the limitation in the event of bankruptcy being good to the extent of the fortune brought by the wife. Whether the consideration for the bond was the wife's fortune, or the husband's,—as the bond was executed before the marriage, it was a good consideration. The principle I contend for is, that those who claim under a defaulting debtor shall not claim more than he could himself; and therefore that there ought to be a sequestration of the dividends on the 1050*l.* The assignees can only claim the life interest of the husband. There is here no default in the wife, but there is in the husband; and the Court will therefore intercept the beneficial interest of the defaulting debtor to the trust fund. The wife is entitled, at all events, to the extent of the for-

(a) 1 C. B. L. 212.

tune she brought the bankrupt, namely, to the sum of 150*l.*; she has a right therefore to ask that this sum shall be at once made good out of the assets, by proof upon the whole debt; and that only the remainder of the dividends on the sum proved shall be applied towards the payment of the interest upon the sum of 1050*l.*, for the benefit of the bankrupt's creditors during his life. The equitable provision to which the wife is entitled is not subject to the doctrine of accumulation.

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ERSKINE, C. J.—There is no dispute in this case, as to the right of proof upon the whole sum of 1200*l.*, but only as to the application of the dividends on this sum. On one side it is contended, that only the dividends on 150*l.*, part of the debt, should be paid to the trustees under the settlement, in order to be applied by them to the payment of interest on that sum to the wife during the life of the bankrupt; and that the dividends on the remaining portion of the debt, namely, the 1050*l.*, should be applied to pay interest on that sum to the assignees during the life of the bankrupt, to be administered as assets usually are in bankruptcy; and after the bankrupt's death, then that the remainder of the dividends on both these sums should be applied for the benefit of the wife and children, according to the trusts of the settlement. On the other side it is insisted, that the dividends upon the whole sum, to the amount of 150*l.*, should be paid to the trustees, to be applied by them towards the payment of interest on that sum to the wife during her life; and that only the residue of such dividends should be retained by the assignees, and be applied by them towards the payment of the interest on the 1050*l.*, for the benefit of the

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—
Ex parte
SHUTE
 and others.

bankrupt's creditors during his life, and upon his death to be applied according to the trusts specified in the bond. The case before Lord *Redesdale* (a) is nearly the same in its circumstances as this; and I should propose to abide chiefly by the principle of that decision, though not to its full extent. The condition of this bond being to pay 1200*l.* to the trustees, upon trust to pay the interest to the party for life, *if he should not become a bankrupt*, and after that event to his wife,—the law declares to be a void condition, so far as it affects his future assets, to the amount of 1050*l.* But to the extent of the sum of 150*l.*, which was advanced to the bankrupt as the marriage portion of his wife, the limitation will, according to the authorities cited, be good; though in other respects the limitation is void as against creditors. The present case differs from that of *Ex parte Turpin* (b); because there the whole fund was to accumulate, there being no condition that the fund should go over in the event of the husband's bankruptcy. I think the trustees should, in this case, out of the dividends payable on the whole sum proved, pay the interest on 150*l.* to the bankrupt's wife, for her separate use, during her life; and then the interest of the dividends beyond that sum may be retained by the assignees during the life of the bankrupt; upon whose death the whole fund will belong, of course, to the bankrupt's wife and children, according to the trusts of the settlement; but beyond the 150*l.* there should be no accumulation. In the case of *Ex parte Meaghan* (c), the income arising from the whole fund was, in the event of the husband's insolvency,

(a) See *Ex parte Meaghan*, 1 Sch. & Lef. 179.

(b) 1 Dea. & Ch. 120; Mont. 443.

(c) 1 Sch. & Lef. 179.

settled on the wife for her separate use. In this case it is to go to her, if he become bankrupt; which shows that the parties here meant the same thing, that is, that the wife was to have the interest for her separate use. And though there is no express provision as to the 150*l.*, yet we are justified in giving such a construction to the settlement, as will secure to her the amount of that sum, which she brought her husband as a marriage portion.

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Sir J. Cross.—This point appears to have been decided by the two cases before the Lord Chancellor of Ireland^(a), but not to the extent contended for by these petitioners. I entertain some doubt as to the question of accumulation, and therefore on that point I do not give any opinion.

Sir G. Rose.—The point is a very familiar one to those conversant with bankruptcy proceedings, that where a legal proof is admitted, the Court will work out any equity which the sum proved is chargeable with. Here the wife has a clear equity against the bankrupt, in regard to the performance of his contract under the condition of the bond, to the extent of 150*l.*, the amount of her fortune on her marriage. The only perplexity in these questions arises in two classes of cases;—first, where there is a condition that in case of the husband's bankruptcy a certain sum shall be paid to the wife;—and secondly, where the provision reserved for her is on an illegal debt. Now, in this case, the reservation of the whole sum being made to the wife in the event of bankruptcy, is void by the policy

(a) *Ex parte Meaghan, supra*; *Ex parte Osley*, 1 Ball & B. 257.

1833.

Ex parte
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and others.

of the bankrupt laws; but it is void only, as against creditors, and only beyond the sum of 150*l.*, which the husband derived from his wife. If it was to be held, that that sum was to go to the bankrupt and his creditors, it would be giving the husband the benefit of the fraud on the bankrupt laws; but, beyond that sum, the creditors may claim the full benefit of the avoidance of the reservation. The creditors, therefore, are fairly entitled to have all the dividends impounded, which exceed the amount of 150*l.*

ORDERED, that the trustees should prove for the 1200*l.*, and invest the dividends in the Three per cent. Consols; and pay the dividend upon so much of the stock purchased as would be equivalent to interest upon 150*l.* sterling, to the separate use of the bankrupt's wife; and the remainder of the dividend on the stock to the assignees, in trust for the bankrupt's creditors during his life; and after his death, then to stand possessed of the whole of the stock upon the trusts of the bond. The costs of the assignees to be paid out of the bankrupt's estate, and those of the trustees out of the trust fund.

Westminster,
January 26.

Ex parte Cocks.—In the matter of Cross.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency, although occasioned by the payment of the rent.

THIS was a petition by an equitable mortgagee of leasehold property, for a sale, and for leave to bid. It appeared, that the landlord of the premises had put in a distress for the amount of the rent due to him. The petitioner, being apprehensive that the proceeds of the

sale might, after payment of the rent, be insufficient to satisfy the principal and interest due to him on the mortgage, submitted, that in the event of there being such deficiency, he ought to stand in the place of the landlord, and not be thrown on the general fund of the bankrupt's estate, to share with the other creditors.

1833.

Ex parte
Cocks.

The COURT, however, refused to make any but the usual order.

Mr. *Thompson*, for the petition.

Mr. *G. Richards*, for the assignees.

Ex parte CROKER.—In the matter of CROKER.

Westminster,
January 26.

THE bankrupt, in this case, petitioned to supersede the fiat, on the consent of all the creditors; but the petition was not set down in the paper, nor was he furnished with the usual certificate of the Commissioners that the creditors consented to the supersedeas.

A petition to supersede with consent of creditors cannot be entertained, without the usual certificate of the Commissioners, nor unless it is set down in the paper for hearing.

Mr. *Keene*, for the petition, stated that the bankrupt was deterred by the expense of procuring the Commissioner's certificate.

The COURT, however, said that both the forms were essential, which were sought to be dispensed with. They could not entertain the petition, without the certificate of the Commissioner; nor unless it was duly set down in the paper for hearing (a).

(a) See 1 Dea. B. L. 813.

1838.

Westminster,
January 26.

On a petition by creditors to supersede, on the ground of fraudulent collusion between the petitioning creditor and the bankrupt, the bankrupt's affidavit detailing the particulars of the fraud is admissible in evidence.

Ex parte ARNSBY, and others.—In the matter of LORD.

THIS was a petition by three creditors, who had not proved under the fiat, to supersede it, on the ground of its being concocted in fraud by the petitioning creditor and the bankrupt; the petitioners alleging that there was no valid petitioning creditor's debt, trading, or act of bankruptcy, but that they were all fictitious. The petition was part heard this day, when

Mr. *Swanston*, and Mr. *Montagu*, who appeared for the petitioners, put in an affidavit of the bankrupt, detailing various communications made to him by the petitioning creditor, for the purpose of persuading him to submit to be made a bankrupt, and to commit an act of bankruptcy.

Mr. *Wright*, and Mr. *Bacon*, objected to this affidavit being received in evidence, on the ground that the bankrupt could not, under these circumstances, be permitted to upset his own commission.

But the COURT overruled the objection.



Southampton
Buildings,
February 11.

Ex parte TANNER.

A party, under special circumstances, admitted an attorney *nunc pro tunc*.

MR. MONTAGU applied for an order that a solicitor, of the name of *Tanner*, might be admitted an attorney of this Court *nunc pro tunc*, on an affidavit which stated, that on the 12th January in last year he

attended the Court and took the oath required (a), that he had been duly admitted an attorney of one of the Courts of Westminster, in order to his admission as an attorney of this Court; when he was told by the officer of the Court that he could not then sign the roll. That he afterwards went into the country, where he remained a considerable time, and through inadvertence had omitted to sign the roll; but that he had regularly taken out his certificate at the Stamp Office, which was now produced; upon which

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Ex parte
TANNER.

The COURT granted the application.

Ex parte COX.—In the matter of BURFORD.

Ex parte SMITH.—In the same matter.

Southampton
Buildings,
February 12.

THESE were two petitions, the one to except to the master's report, and the other praying that the report might be confirmed.

A petition to except to a report is heard before a petition to confirm it, notwithstanding the latter petition stands first in the paper. The petition must specify the exceptions. The master should not draw conclusions of law; but leave the legal result to the Court.

Mr. Bligh, who appeared in support of the petition to except to the report, applied that that petition might be first heard, though it stood after the other in the paper.

The COURT, thinking this but reasonable, granted the application.

Mr. Bligh then proceeded to state the facts in the petition, when

(a) See vol. i. p. 5.

1833.

Ex parte
Cox.
Ex parte
SMITH.

Sir G. ROSE observed, that the exceptions ought to have been specified and embodied in the petition; and that the proper course was to petition for leave to except, and therein to show for exceptions, as follows, —&c., &c. The master, however, certainly seems to have interfered with the province of the Court, in drawing conclusions of law, and coming to a result which it was for the Court alone to do. The duty of the master was to state specific facts, and leave it to the Court to come to a result upon it.

The COURT ordered both petitions to stand over, with leave for the party to except in the proper form, as stated by his Honor Sir G. Rose.



Southampton
Buildings,
February 12.

Where the interest of the joint creditors appears, *prima facie*, adverse to that of the separate creditors, the Court will, on the application of the latter, appoint an inspector to take care of their interests.

Ex parte SARAH DAWSON and others.—In the matter of GEORGE DAWSON and JAMES KERR.

THIS was the petition of the separate creditors of *George Dawson*, one of the above-named bankrupts, for the appointment of an inspector, to manage his separate estate, and to prove on behalf of the separate creditors against the joint estate. The facts stated in the petition were as follows.

The two bankrupts carried on the business of manufacturers in partnership from November 1824 to August 1831, when a commission issued against them; but *Dawson* also carried on the business of a dyer and bleacher on his own separate account, in which *Kerr* had no manner of interest. In the course of his business as a dyer and bleacher, *Dawson* dyed and bleached

goods for the joint firm of *Dawson* and *Kerr*, the charge for which amounted to 16,000*l.*; and the petitioners contended, that the separate estate had a right to prove this sum against the joint estate. The assignees chosen under the commission were all creditors of the joint estate; against which estate the amount of the debts proved was 16,500*l.*, and against the separate estate the proofs amounted to 7450*l.* Since the commencement of the partnership *Dawson* mortgaged certain freehold and leasehold property, to which he was separately entitled, to *Fell & Co.*, bankers, of Ulverston, for the purpose of securing them for advances to the joint firm; and *Kerr* also mortgaged to them property belonging to him for the like purpose; upon the result of which transactions *Fell & Co.* claimed to be creditors upon the joint estate to the amount of 6000*l.*, as well as the right to retain their mortgage security; but when they applied to prove their debt, it was rejected by the Commissioners, as being tainted with usury.

It appeared, also, that *Dawson* had previous to his marriage, by indentures of the 9th and 10th June 1830, conveyed to trustees other parts of his real and leasehold estate, by way of settlement on his wife; which settlement the assignees contended was fraudulent; but the Commissioners admitted the trustees to prove for the sum of 1200*l.*, which *Dawson* had covenanted to pay by one of the deeds under the settlement. The assignees had, in order to try the validity of the settlement, brought an action of ejectment, which proceeded to issue and notice of trial; but which they afterwards abandoned, having been advised that the settlement was valid.

On the 4th October last, the petitioners attended

.1833.

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Ex parte
DAWSON
and others.

1833.

Ex parte
Dawson
and others.

with *Dawson* before the Commissioners, for the purpose of tendering a proof by *Dawson* against the joint estate of the debt of 16,000*l.*, which they contended was due from the joint estate of *Dawson* and *Kerr* to the separate estate of *Dawson*. The assignees, however, objected to such proof, on the ground that this sum could not be considered as a debt, but an advance by way of *Dawson's* capital in the business; and the Commissioners rejected the proof.

The petitioners alleged that they, as separate creditors of *Dawson*, were greatly interested in the questions as to the validity of the mortgage to *Fell & Co.*, and of the marriage settlement, as well as to the right of proof by the separate estate of *Dawson* against the joint estate of *Dawson* and *Kerr*; which questions the petitioners being desirous of having determined by a higher tribunal, wished some person to be appointed by the separate creditors of *Dawson* to manage his separate estate, and to establish the right of the separate estate to prove the sum of 16,000*l.* against the joint estate.

The petitioners therefore prayed, that a meeting of *Dawson's* separate creditors might be called for the purpose of choosing a proper person to act as inspector, and to superintend and manage such separate estate, upon indemnifying the assignees against all costs; and that the inspector might prove, on behalf of the separate creditors, against the joint estate of *Dawson* and *Kerr*; and that the costs of this application might be paid out of *Dawson's* separate estate.

Mr. *Montagu*, and Mr. *J. Russell*, appeared in support of the petition. Where one member of a partner-

ship carries on another business on his separate account, and supplies goods to the partnership, and a joint commission issues against the partners,—it has been determined, that the debt is provable against the joint estate, *Ex parte Cook* (a). [*Erskine*, C. J. Can you do any thing here but claim the surplus of the joint estate?] We contend, on the authority of *Ex parte Cook*, that one estate can prove against the other. The distinction in all these cases is, that a solvent partner cannot prove against the bankrupt partner, in competition with the general creditors; but when both partners become bankrupt, then one estate can prove against the other. In this case, *Dawson*, in his separate trade of a dyer, dyed the goods manufactured by the partnership; and there is a large sum due on this account from the joint estate to the separate estate of *Dawson*. Then, as there is no one at present in a situation to prove this debt against the joint estate, a proper person should be appointed for this purpose, with the sanction of the Court.

1833.

Ex parte
DAWSON
and others.

Mr. Swanston, and *Mr. Anderson*, contra. The assignees under a joint commission against two partners are as much trustees of the separate estate of the one, as of the joint estate of the two; and the joint creditors might, with as much reason as the separate creditors in the present instance, urge the appointment of an inspector of the joint estate. Why should the Court infer, in this case, that the assignees will not do their duty? [*Sir J. Cross*. The proof here of the separate debt of *Dawson* against the joint estate will be contrary to the interests of the assignees, who are creditors of the joint estate.] The

(a) *Mont. Rep.* 228.

1833.

Ex parte
DAWSON
and others.

Court will not calculate by how much delinquency a man may put money into his purse, nor assume that the interest of the assignees will occasion a dereliction of principle in their conduct. [*Erskine*, C. J. In *Ex parte Batson*(a), an inspector was appointed for the separate estate, where the joint creditors had no interest in it.] That case was decided by the Vice-Chancellor; but Lord *Lyndhurst* never made a decision of this kind. [Sir *G. Rose*. I should lay it down as a general rule, that where there is a *prima facie* case of the joint creditors being adverse to the interests of the separate creditors, and the separate creditors offer to pay the costs of the appointment of an inspector, the Court will, in such case, sanction the appointment, in order that the interests of the separate creditors may be better protected.] The real object of this application is to take the management of the separate estate entirely out of the hands of the assignees. It is an attempt of one solicitor to take out of the hands of another, who is the solicitor to the commission, the conduct of some important proceedings pending under the commission. There is a claim of 16,000*l.* made by the separate estate against the joint estate, which the Commissioners rejected, on the ground that it was not a debt due to *Dawson*, but merely an advance by way of his capital in the joint business.

The COURT however thought that, under the circumstances of this case, an inspector should be appointed to take care of the interests of the separate creditors, but so as not to restrain the assignees from proceeding under the commission, as they might think fit.

(a) 1 G. & J. 69.

The Order made was, that the petitioner and the other separate creditors might choose an inspector or inspectors on behalf of the separate estate, with the usual directions as to using the names of the assignees, and the production of the commission and proceedings, on entering into a proper indemnity to assignees. And that the petitioners should pay the costs of this application, and of the choice and appointment of such inspectors, and incidental thereto respectively, reserving the question how far the petitioners were to be reimbursed the same out of the separate estate generally.

1833.

Ex parte
DAWSON
and others.

Ex parte CROUCH.—In the matter of OWEN.

Southampton
Buildings,
February 14.

THIS was a petition to stay the bankrupt's certificate, on the ground that he had lost money at play.

On an application to adjourn the hearing of a petition, for the purpose of answering affidavits filed in opposition, the Court will first hear the petition and affidavits read.

Mr. *Teed*, who appeared in support of the petition, applied that the hearing might be adjourned, on the ground of six affidavits having been filed in opposition on the 12th instant, and that the petitioner had not had sufficient time to answer them.

A petition to stay the certificate, charging, that the bankrupt admitted that he had lost 25*l.* in one sitting, is demurrable; it ought positively to allege the fact, and that the money was lost in one day.

Mr. *J. Russell*, contra. There was ample time to get copies of the affidavits; and the petitioner's attorney had notice, on the 11th instant, that the affidavits would be filed on the following day.

The Court thought, that they should first hear the

1833.

Ex parte
CROUCH. petition and affidavits read, in order to see whether there was any ground for the application for time to answer them.

Mr. *J. Russell*, for the bankrupt, then demurred to the petition, on the ground that there was *no one fact* stated in it to support the allegations of gaming, with which the bankrupt was charged; that it did not specifically allege that the bankrupt had actually lost any given sum, but merely stated that he had admitted that he had lost 25*l.* in 1829 at one sitting.

Mr. *Teed* contended, that the bankrupt's admission of the fact was sufficient, without going on to allege that the fact was so.

But the COURT allowed the demurrer; and added, that, independently of the objection already taken to the petition, there was another defect that was fatal to it, namely, the omission to allege that the money *was lost in one day*; for it was only under this predicament, that the bankrupt was not entitled to his certificate, according to the provisions of the act of parliament (a).

Petition dismissed with costs.

(a) 6 G. 4. c. 16. s. 130.



1839.

Ex parte KILSBY.—In the matter of KILSBY.

Southampton
Buildings,
February 14.

THIS was a petition of the bankrupt to supersede the fiat, on the ground that it had been directed to five attornies at Southampton, without including the name of any barrister; although there was a practising barrister residing within 12 miles of Southampton, who would have been willing to attend for the statutable fees.

The Court will in all cases uphold the General Order of Lord *Loughborough*, which directs that in country commissions there must be inserted the names of two barristers.

Mr. Deacon, in support of the petition, referred to the General Order of Lord *Loughborough*(a), which directs, that in all commissions to be executed in the country, there must be inserted the names of two barristers resident at or near the place where the commission is to be executed; and that on no account is there to be inserted the name of any gentleman to be nominated as a *quorum* Commissioner, unless he be a barrister. The 6 Geo. 4. c. 16. s. 23., also, adopting the spirit of Lord *Loughborough*'s order, directs that at every meeting under commissions executed in the country, where any of the Commissioners are barristers, such barristers, or as many of them as shall be willing to attend, not exceeding three, shall be the acting Commissioners, and shall be summoned in priority to any of the other Commissioners. In this case, there was not only a practising barrister residing in the neighbourhood, but it was sworn on affidavit that the attorney who issued the fiat well knew that fact, and that the barrister in question was in the habit of at-

(a) August 12, 1800; 2 Deac. B. L. 95.

1833.

Ex parte
KILSBY.

tending as a Commissioner on other fiats which were executed at Southampton.

Mr. *Wilcock*, for the petitioning creditor and his solicitor, submitted that the informality was too unimportant to induce the Court to supersede the fiat; more especially in a case like this, where the estate was a small one, and the expense of a new fiat would be a heavy burthen on the creditors. The bankrupt disclaimed being a voluntary party in this proceeding; for although his signature was attached to the petition, he now regretted that he had been induced to sign it. Many barristers reside in the country, who do not practice; and it would be unreasonable to expect that a solicitor should set out on a voyage of discovery to find those who did, and those who did not practice. The barrister alluded to in this case resided at a retired place called Fareham, 11 miles from Southampton, but he had chambers at Gray's Inn. This was a vexatious proceeding, which did not call for the interference of the Court.

Mr. *Deacon*, in reply, was stopped by the Court.

ERSKINE, C. J.—I do not think that this is a question of any consequence, as affecting the solicitor, or the bankrupt, in their relative position to each other; but it is a serious question, as between the solicitor and this Court. The solicitor, it appears, has wilfully neglected to conform to one of the most important rules long acted upon, that regulate the proceedings in issuing country fiats, and which it is the determination of this Court strictly to enforce; as much inconvenience

and loss has ensued from inexperienced persons acting on commissions of bankruptcy. There was a want of due diligence on the part of the solicitor who issued this fiat; as he did not take proper steps to discover if a practising barrister resided in his neighbourhood. We, therefore, think that he ought to pay the costs of this application; but as the estate is a small one, the Court will not impose on it the expense of a new fiat.

1833.

Ex parte
KILSBY.

Ex parte ACKROYD.—In the matter of WATTS.

Southampton
Buildings,
February 14.

THIS was the petition of a surviving assignee for an order on the solicitor, who had been appointed by the deceased assignee, to deliver up the proceedings under the commission to a fresh solicitor, who had been appointed by the petitioner; and that his bill of costs might be taxed.

The solicitor is bound to deliver up the proceedings to a fresh solicitor appointed by the surviving assignee, without waiting until a fresh assignee is chosen in the room of the one who is dead.

Mr. *Montagu* appeared in support of the petition.

Mr. *Swanston*, for the respondent, contended that the regular mode of proceeding to tax the solicitor's bill was, to apply to the Commissioner, and that the assignee need not have come to this Court for that purpose. With respect to the delivery up of the proceedings, the petitioner ought to wait until a fresh assignee was appointed in the room of the one who was dead. But by the 40th section of the Bankruptcy Court Act, the existing assignees are required, *under an order of the Commissioner*, to deliver over all books, papers, &c. in their possession or custody, to the official

1888.

Ex parte
Acrabob.

assignee. And there has been no order of the Commissioner yet obtained for this purpose.

The COURT said, that the obligation of the petitioner to deliver over the proceedings to the official assignee, as soon as directed to do so by the Commissioner, was a sufficient reason for making this application, and that there was no ground whatever for the solicitor's refusal.

The Order was therefore made as prayed.

Southampton
Buildings,
February 14.

One of the assignees, having the sole charge of paying the dividends, pays the dividend of a creditor to a person who is not duly authorized to receive it. The two other assignees are equally responsible to the creditor for the amount of the dividend.

Ex parte WINNALL.—In the matter of WINNALL.

THIS was the petition of a creditor, who had proved under the commission, for an order on three assignees, to pay him a dividend on the amount of his proof. It appeared, that the petitioner had employed an attorney of the name of *Smith*, to assist him in proving his debt; and that one of the assignees, who took upon himself the payment of the dividends, had paid the dividend in question to *Smith*, who shortly afterwards absconded with the money. And the petitioner now sought to recover the amount from the assignees, contending that they had made the payment to *Smith* in their own wrong, and without any authority from the petitioner.

Mr. *Ayrton* appeared in support of the petition.

Mr. *Swanston*, and Mr. *Montagu*, appeared for the assignee who had paid the dividend; and stated that


when the son of the petitioner called on the assignee requesting the amount of the dividend, he was told that it had been already paid to *Smith*; upon which he observed, that he would go to *Smith* and get it from him. This, they contended, was a sufficient proof of the agency of *Smith*.

1833.
—
Ex parte
WINNALL.

Mr. *J. Russell*, on behalf of the two other assignees, contended, that as they did not interfere in the payment of the dividends, and had no control over the funds with which they were paid,—the money appropriated to pay the dividends being in the exclusive possession of the other assignee,—these two assignees could not be held responsible for the payments made by the assignee, who had the money in his hands, and the sole management and charge of paying the dividends.

The COURT thought, that there was no proof whatever of the agency of *Smith*, and that the dividend had been paid to him unauthorized by the petitioner. They also held, that the two assignees were responsible for the acts of their co-assignee; and that whatever arrangements the assignees might make with each other, for their own convenience, they were all jointly liable to the bankrupt's creditors for the due payment of their dividends.

It was ORDERED, therefore, that the assignees should pay to the petitioner the amount of his dividend, with interest, together with the costs of this application.



.1888.

Southampton
Buildings,
February 19.

The petition of
an equitable
mortgagee must
be served upon
the assignees;
service on the
solicitor is irre-
gular.

Ex parte Cooks.—In the matter of **PEACHEY**.

THIS was the petition of an equitable mortgagee for a sale, and for leave to bid. The affidavit of service stated, that a copy of the petition was served on the solicitor to the commission; but it did not appear to have been served on the assignees.

The Court held the service to be irregular; but the counsel for the assignees consenting,

The Order was made as prayed.

Same day.

Ex parte ———. —In the matter of **REMINGTON**
and **STEVENSON**.

The surviving
trustee under a
marriage settle-
ment becomes
bankrupt, and is
outlawed. On
the application
of the *cestui que*
trusts, the Court
ordered the as-
signees to trans-
fer the trust
stock to new
trustees.

THIS was a petition by *cestui que trusts*, under the 79th section of the Bankrupt Act, 6 Geo. 4. c. 16., for the transfer of stock to new trustees. It appeared, that the bankrupt *Stevenson* and a Mr. *Wainwright* had been, by the marriage settlement of the petitioners, appointed joint trustees of a sum of 7735*l.* 3 per cent. consols, and that the same was now standing in their names at the bank. *Wainwright* was dead, and *Stevenson* having never surrendered himself to his commission, was outlawed. The petitioners had, under a power reserved to them in the settlement, appointed two new trustees in the place of *Wainwright* and *Stevenson*; and they now prayed that the assignees of *Stevenson*, the sole surviving assignee, might be ordered

to transfer the stock to the new trustees, upon the trusts of the settlement.

1833.

Ex parte

Mr. *Rudall* appeared in support of the petition.

Ordered as prayed.

Ex parte THOMAS MUCKLOW.—In the matter of
JAMES MUCKLOW.

Southampton
Buildings,
Feb. 19, 21,
and 23.

THIS was the petition of the father of the bankrupt, who was also a creditor to a large amount, for annulling a fiat, under the following circumstances.

Two creditors persuaded a bankrupt to execute an assignment of his effects to them for the benefit of his creditors, and then issue a fiat against him, setting up this assignment as the act of bankruptcy. They then seize his furniture and stock, without taking any proceedings under the fiat. On the application of a *bonâ fide* creditor, this fiat was ordered to be annulled, and a new one issued.

The fiat was issued on the 30th January 1833, upon the petition of *Frederick Bowyer*; but no proceedings had yet been had under it. *Bowyer* was in partnership with *Charles Emery*, and there was no debt due from the bankrupt to *Bowyer* alone. On the 15th December 1832 *Emery* and *Bowyer* had previously struck a docket against *J. Mucklow*, on which, however, no fiat was issued. The debt, on which that docket was struck, was the same as that on which *Bowyer* alone subsequently issued the fiat now sought to be annulled.

Where a petition is permitted to stand over, to enable the petitioner to be prepared with an affidavit of service, the respondent must have notice of the day when the petition is to be brought on.

It appeared, that in the beginning of the month of January the bankrupt was arrested at the suit of Messrs. *Moilliet, Smith, and Co.*, bankers, for 800*l.*; and that on the 5th January he put in special bail to the action. *Emery*, who was then on close terms of intimacy with the bankrupt, proffered him his assistance to extricate him from his difficulties; and after many

A petition answered for a particular day should be placed at the head of the paper of that day.

1833.

Ex parte
MUCKLOW.

consultations with him for that purpose, *Emery*, on behalf of himself and *Bowyer*, concerted that *J. Mucklow* should commit an act of bankruptcy, by making an assignment of his estate and effects, with a view of taking out a fiat. In the course of their communications for this purpose, *Emery* on the 17th January 1833 wrote the following letter to the bankrupt, from which the following is an extract:—"At all events I must say you appear very little concerned, and it will be well if you can get through your difficulties so easily. One question I asked was, whether I should get an assignment prepared; which, if not immediately done, the commission will be opened. Am I at last to understand, that nothing is to be done on my behalf? I trust you do not let this escape your attention." On the 20th January he again wrote to the bankrupt as follows:—"I have got the draft of assignment prepared, but I wish you to inspect it before it is put on stamp. Be so good therefore to come to my house immediately on your receiving this. I will then get it engrossed and finished, and I trust in one fortnight all will be over and off your mind. The deed is as favourable as you could wish it, and I shall get it executed by all parties without delay, and the property divided; so that you may go on with your new business satisfactorily. Now comes my own interest. You are aware, I am entirely placing myself at your mercy; but I trust, as I always have done, you will take care that I shall not eventually be a material sufferer."

The bankrupt accordingly executed an assignment of his estate and effects, and *Emery* inserted an advertisement in the *Birmingham Gazette* of the 4th February, to the following effect:—"Notice is hereby given, that by an indenture of assignment dated 22d

January 1833, *J. Mucklow*, of &c., has assigned all his personal estate and effects whatsoever unto *C. Emery* and *E. Middleton*, in trust for the equal benefit of all his creditors, who shall execute the deed within two calendar months from the date thereof, and who will, in default of their so executing, be debarred from all benefit and advantage arising therefrom. The deed is now in the possession of the said *C. Emery*, for the signature of the creditors. All persons who stand indebted to the said *J. Mucklow* are hereby required to pay the amount of their respective debts to one of the said trustees, and to no other person, within ten days from the date hereof. Dated the 1st February 1833."

1833.

Ex parte
MUCKLOW.

On the 29th January 1833, which was after the assignment had been executed, the parties who had become special bail for the bankrupt, caused him to be taken into custody; upon which *Emery* wrote another letter to the bankrupt, urging him to act implicitly on his, *Emery's* advice, and promising that he would thereby get him through his difficulties.

The petition alleged, that *Bowyer* well knew the contents of all the letters, and all the proceedings, before the 30th January. That the act of bankruptcy, upon which the fiat of the 30th January issued, was the deed of assignment which *Emery* and *Bowyer* had in fact procured. That in pursuance of the assignment, *Emery* and *Middleton*, with the approbation and consent of *Bowyer*, had caused all the household furniture of the bankrupt to be sold by auction, and that *Emery*, with *Bowyer's* knowledge and approbation, had caused a large quantity of the bankrupt's stock in trade to be removed off his premises. That *Bowyer*

1833.

Ex parte
MUCKLOW.

never had any intention of proceeding with or working the fiat; but that his only object was to use it for the purpose of preventing interference with the proceedings under the deed of assignment; and that the petitioner was a creditor of the bankrupt, to the amount of 4500*l*.

The petition then prayed, that the fiat of 30th January 1833 might be annulled, that the petitioner might be at liberty to issue a new fiat, and that *Emery* and *Middleton* might be restrained from selling, or receiving any money for, the bankrupt's property; and that *Bowyer* might pay all the costs.

The petition had been answered specially for the 19th February, and was now called on in the absence of the respondent; but the petitioner was prepared with no affidavit that the respondent had been served with a copy of the petition.

Mr. *Swanston*, for the petitioner, submitted to the Court, as the petition was answered specially for to-day, and there was no doubt that the respondent had been served with the petition,—although he was unable at present, from some inadvertence, to prove that fact,—whether, if he could produce a proper affidavit of service on Thursday the 21st instant, the Court would not make an order then on the petition, without any previous notice to the respondent that the petition was to come on again on Thursday.

ERSKINE, C. J.—In strictness, your petition should now be struck out of the paper, as you have no affidavit of service; and therefore if it is to be brought on again on Thursday, the other side should have notice. The only difficulty in the way of making any order at

present on this petition is, that the affidavit of service is not now produced to the Court.

1833.

Ex parte
MUCKLOW.

The COURT, however, permitted the petitioner to take out a fresh fiat, without prejudice to the merits of the petition, and ordered the petition to stand over till Saturday the 23d instant.

Mr. *Anderdon*, on behalf of the respondent, applied this day for an order to stay the execution of this second fiat, which had been issued by the petitioner under the sanction of the Court,—until the petition was finally heard and disposed of. He stated, that the petition had on the former day been unexpectedly put at the head of the paper, and he was not prepared for its being called on so early in the day. February 21.

Sir G. ROSE.—When a petition is answered specially for a particular day, the officer does quite right to place it at the head of the paper of that day. The conditional order obtained by Mr. *Swanston* will be a nullity, if you will open your fiat.

On the petition coming on to be heard this day, Mr. *Swanston* and Mr. *Koe*, who appeared in support of it, after stating the facts of the case, were stopped by the Court. February 23.

Mr. *Anderdon*, for the respondent *Bowyer*, contended that he was still at liberty to prosecute the fiat of the 30th January. The object of the respondent and of *Emery*, in the course they had pursued, was fair

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and open. They had no intention to prosecute the commission, or the assignment, for any personal benefit to themselves. The mere objection, that the act of bankruptcy was concerted, cannot now be suffered to prevail. [*Erskine*, C. J. There is no doubt upon that point; this Court having, over and over again, intimated that *mere concert* would not invalidate a fiat.] It has been held, also, that it is no objection to a commission, that it was taken out with the intent to defeat a previous execution(a). It may be admitted, that the parties to an assignment which constitutes an act of bankruptcy, whether actually parties, or merely privies thereto, or acting under it, cannot afterwards set it up as an act of bankruptcy, whereon to sue out a commission(b). But if they can substantiate a prior act of bankruptcy, they may be allowed to work out the commission; so that it is not always of course to supersede a commission taken out by such persons. In this case it would, if needful, be in the power of the respondents to prove that a prior act of bankruptcy had been committed, by the bankrupt shutting up his shop, and absenting himself from his creditors. Should the Court, however, supersede this fiat, it should be remembered, in reference to the costs,—that at least the bankrupt's creditors have received some benefit under it, by the notice they have acquired of the bankrupt's state of his circumstances,—and that no fraud has been intended by the respondents. And, as respects the party now seeking to prosecute the new fiat, it should be also

(a) *Menhem v. Edmonson*, 1 Bos. & Pul. 369; *Ex parte Edmonson*, 7 Ves. 303; *Ex parte Gardner*, 1 Rose, 377, 1 V. & B. 45; *Ex parte Arrow-smith*, 14 Ves. 209.

(b) See 1 Dea. B. L. 69.

borne in mind, that he is the father of the bankrupt, and more likely to work it for the bankrupt's sole benefit, than with a view to any real advantage to the general body of creditors. Neither has the time allowed by the General Order of Lord *Loughborough* (a) yet elapsed; so that to supersede this fiat would be setting up a precedent in the very teeth of that order.

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Mr. *Swanston* was not called upon by the Court in reply.

ERSKINE, C. J.—Had the object of this petition been vindictive, and tending to subject the respondents to the consequences (b) of fraudulently and maliciously suing out the fiat of the 30th January, the Court might have hesitated before it pronounced its present decision. But the object is simply to supersede a fiat improperly taken out, without making any further charge. It is urged, however, that by doing so, in the present instance, we shall be setting a dangerous precedent, and infringe on the rights of parties defined by Lord *Rosslyn's* General Order. But we are not required to supersede this fiat, on the ground that it has not been prosecuted within the twenty-eight days,—which, it is true, have not yet expired,—but because it was taken out merely as a shelter and protection to the deed of assignment, and not with any view of prosecuting the fiat. The General Order that has been referred to has, therefore, nothing to do with this case. The question is, then, was the object of issuing this fiat the one alleged in the petition? Now the ne-

(a) 26th June 1793.

(b) See 1 Deac. B. L. 134.

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gative has, on the part of the respondents, been hardly even asserted, and far less proved. Neither *Bowyer*, nor *Emery*, has sworn that the object of the fiat was to prosecute it for a *bonâ fide* purpose, or even to prosecute it at all. On the contrary, all *Emery's* letters show his object to have been adverse to the interests of the bankrupt's creditors. Instead, also, of acting under *Bowyer's* fiat, *Emery* seizes the bankrupt's goods, and proceeds to a sale of them, without the least attempt on the part of *Bowyer* to throw any opposition in his way. This is clear evidence of the intentions of the parties, and quite sufficient to induce us to supersede this fiat, and suffer a *bonâ fide* creditor to sue out another. As to the objection that the petitioner is the bankrupt's father, and therefore more likely to work it for the bankrupt's benefit, than for that of the creditors,—there is no doubt but that his conduct will be sufficiently watched, so as to form a proper safeguard to the interests of the creditors. The petition must, therefore, be granted *in toto*, *Bowyer* paying all the costs, as prayed.

Sir J. Cross.—The respondents in this case have armed themselves with all the power they could, to succeed in their improper motives; first, with the deed of trust, next with the fiat. On the 15th December they struck a docket, and did not proceed upon it. They then lie by till the 22d January, when the deed of trust is executed. On the 29th January the bankrupt is taken into custody by his bail, and on the 30th the fiat is sued out. *Bowyer* must have known all these facts from his partner; what is proved before us sufficiently testifies his co-operation. The fiat had,

then, the effect of protecting the deed of trust, and its only object was to afford that protection; for on the 4th February *Emery* advertises the sale under the trust deed, and all the effects are swept away under it; and the respondents do not swear that they had any intention to carry the fiat into operation. I entirely concur in the judgment that has already fallen from his Honor the Chief Judge.

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Sir G. ROSE concurred, observing, that the respondents could have had no other act of bankruptcy in view than the deed of trust. The twenty-eight days, given by the General Order for the prosecution of a commission, do not give the first person who strikes a docket an *absolute* right to the fiat, so as to preclude another party from coming to this Court, and applying, under special circumstances, for another fiat. Whether the Court, indeed, will order another fiat to issue, is always a matter of discretion,—a discretion, however, which I think will be rightly exercised in the present instance. For the General Order can never be suffered to avail as a cover for such negligence, to say the least of it, as has this day been established before us.

ORDERED, that on the petitioner undertaking to proceed with the fiat already issued by him, the fiat issued by *Bowyer* should be annulled, and that *Bowyer* should pay the costs of, and incidental to, this application.

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Southampton
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The Court refused to make an order, that service of a petition against an attorney,—for an order to pay certain costs for which he had been declared liable,—by leaving a copy at his chambers, should be deemed good service.

In the matter of SANDYS.

THIS was a petition against an attorney, for an order on him to pay the amount of certain costs which had been taxed, and for which he had been declared liable by a previous order of the Court. There was a difficulty in serving him personally with the petition, as his chambers were generally shut; and when they were open, he was always denied; and it was sworn that he kept out of the way, as it was believed, to avoid personal service.

Mr. *Swanston*, for the petitioner, now applied for an order, that service of the petition, by leaving a copy at the attorney's chambers, might be deemed good service. He stated that he did not make the application with a view to the issuing of an attachment, but merely to make the party liable in another proceeding.

ERSKINE, C. J.—As that mode of service would not be a ground for an attachment against the party, I do not see that any object would be answered by making such an order.

The motion was therefore refused.



Ex parte JOHN BRITTEN and others.—In the matter of THOMAS CLAUGHTON.

1832.

Southampton
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THIS was a petition to prove a bill of exchange for 1000*l.*, of which the bankrupt was the acceptor, and the petitioners were the holders, under the following circumstances, as stated in the petition.

The petitioners, who were Blackwell Hall factors, were in the habit, for several years, of making large advances to *E. Hickman*, a money broker, who deposited with them, by way of security, various bills of exchange to an amount somewhat exceeding the sums from time to time due to the petitioners, in respect of such loans. These bills were alleged by the petitioners to have been deposited with them as a general security for all floating balances, which at the time of the deposit, or at any time afterwards, might be due to the petitioners in the course of their pecuniary transactions with *Hickman*; but the bills were not indorsed by *Hickman*, nor were they ever negotiated by the petitioners. *Hickman*, when the petitioners had occasion for cash, repaid them various sums of money on account of the advances they had made to him, and then took away such of the bills as he thought proper, without any respect to dates or amount, provided he left bills to a sufficient amount to cover the then balance due. He was also in the habit of exchanging some of the bills deposited for others at different dates, if they were equally good, and of nearly the same amount. Amongst the bills so deposited was the bill

H., a money-broker, was in the habit of depositing bills of exchange with *B. & Co.* as a security for advances, but he did not indorse the bills, nor were they negotiated by *B. & Co.*, or ever presented for payment. Amongst the bills so deposited was one for 1000*l.*, accepted by *C.*; who became bankrupt on the 5th March 1824, which was some time after the bill fell due. *H.* also became bankrupt on the 12th December 1825, when *B. & Co.* proved the amount of the balance he owed them, excepting this bill as a security; but made no attempt to prove the bill under *C.*'s commission until January 1826, when the Commissioners rejected the proof:—Held, that the delivery of the bill by *H.* to *B. & Co.* must be taken to have been by way of pledge, to secure the amount of the

advances then due from *H.* to *B. & Co.*, and not with an intention to transfer the property in it; and that the amount of those advances having been since paid, *B. & Co.* could not, under these circumstances, prove the bill under *C.*'s commission.

A party is not estopped from amending his deposition of proof, by making a second deposition, contradictory to the first: the only question is, which is the most worthy of credit.

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now sought to be proved. This bill, which was dated the 20th May 1823, was drawn by *Orrel* and *Pember-ton* upon the bankrupt for the sum of 1000*l.*, and was payable, three months after date, to the order of the drawees, and was by them indorsed to *Hickman*, who deposited it on the 27th May 1823 with the petitioners; when *Hickman* received in exchange another good bill, which had been previously deposited by him. Shortly before the bill for 1000*l.* became due, *Hickman* requested the petitioners to keep it in their possession, representing to them that the principal and interest were perfectly safe; in consequence of which the petitioners abstained from negotiating the bill. On the 12th December 1825 a commission of bankrupt issued against *Hickman*, and the petitioners proved under his commission the sum of 1907*l.*, being the amount of the balance then due to them from him, and received dividends upon such proof to the amount of 89*l.* 9*s.* 8*d.* On the 5th March 1824 a commission had also previously issued against *Claughton*; but the petitioners were not aware of this fact until shortly before the bankruptcy of *Hickman*; when they immediately took the necessary steps to prove the bill for 1000*l.*, and 25*l.* for interest, under *Claughton*'s commission, and applied for that purpose at a meeting in January 1826; but the Commissioners directed the proof to stand over, until certain inquiries were made respecting the bill by the solicitors to the commission; all which inquiries were answered by the petitioners on affidavit, which was forwarded to the solicitors. No other meeting was held for proof of debts until December 1828, a few weeks before which time the solicitors required to be furnished with a statement of the account between the petitioners and *Hickman*, which was accordingly sent,

showing a balance of 789*l.* 2*s.* 5*d.* to be due to the petitioners from *Hickman* upon the 1st January 1828; which account was certified by *Hickman* to be correct. The Commissioners, however, still declined to receive the proof; and the solicitors then required to be furnished with a statement of the petitioners' account with *Hickman*, from the 27th May 1823 (when the bill for 1000*l.* was deposited) up to September 1825. This account was also rendered by the petitioners; from which it appeared, as the fact was, that although pecuniary transactions passed between the petitioners and *Hickman*, in the interval, to the amount of 40,000*l.*, yet that there was always a floating balance due to the petitioners of more than 1000*l.*, and that when the bill was deposited, the balance was upwards of 6700*l.* The Commissioners again rejected the proof, on the ground that this last-mentioned balance had since been paid, and that the bill was only deposited as a collateral security for the payment of such balance. No further steps were taken by the petitioners until a dividend meeting on the 29th November 1832, which one of the petitioners attended for the purpose of again tendering their proof, and also of answering any questions that might be asked him by the Commissioners; and on this occasion it was sworn, not only by the petitioners, but by *Hickman*, that the bill for 1000*l.* was delivered to them by way of collateral security, as well for money before that time lent and advanced by the petitioners to *Hickman*, as also for money which should be *thereafter* advanced. But the Commissioners finally rejected the proof, for the reason before assigned, as well as for the following,—namely, that *Hickman* had no power by law to deposit the bill as a security for money advanced, and to be advanced; and that the petitioners

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were not at liberty to amend the deposition made by them on the former occasion.

The petitioners therefore prayed, that they might be declared entitled to prove the bill for 1000*l.*, as well as the sum of 31*l.* 19*s.* 6*d.* for interest thereon; and that the assignees might be ordered to pay to the petitioners the amount of all past and future dividends payable thereon, as well as the costs of this application, and the expenses incurred by the petitioners on the occasion of their attending at Manchester, for the purpose of tendering such proof.

Mr. *Montagu*, and Mr. *Dixon*, appeared in support of the petition. The bill being indorsed in blank, the property in it passed to the petitioners by the delivery from *Hickman*. The custom of business in London is, that when a bill-broker wants to raise money, he deposits a number of bills with a banker; and if he requires further accommodation beyond the time when the bills fall due, he then deposits another class of bills, in exchange for those previously deposited, which he accordingly takes away. In *Atwood v. Crowdie* (a) it was held, that where bills were deposited with bankers on a floating account,—although, when the bills became due, the balance of the account was against the bankers, and their lien of course ceased then to attach on them,—yet that by allowing the bills to remain in their hands, their lien reverted, when, upon fresh advances made, the balance of the account turned in their favour. [Sir *J. Cross*. The bankers in that case were indorsees of the bills.] The bill-brokers do not once in a thousand times indorse the bills, which they bring to a banker's

(a) 1 Star 483.

for the purpose of raising money on them. When they take away one, they deposit another in its room. [Sir G. Rose. The first question is, what was the title of *Hickman* to this bill, so as to enable him to deposit it with the petitioners—the next, what were the terms of the deposit.]

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Mr. Swanston, who appeared for the assignees, stated, that it was expressly sworn that *Cloughton* received no valuable consideration for the bill.

Sir J. Cross.—The right of the petitioners to the bill must, of course, be subject to the account between *Hickman* and *Cloughton*.

Mr. Montagu, and Mr. Dixon, in continuation. We contend, that the state of the account between *Hickman* and *Cloughton* makes no difference in this question. In *Ex parte Bloxham* (a) it was held, that a creditor, having securities of third persons to a greater amount than the debt, may prove and receive dividends upon the full amount of the securities, to the extent of 20s. in the pound upon the actual debt. That case was very similar to this. *Kirkpatrick*, having an account with the petitioners as his bankers, from time to time remitted them bills to answer his drafts, and, among others, six bills accepted by *Young* and *Glennie*; the petitioners had proved the amount of their debt under a commission against *Kirkpatrick*; and it was held, that they might also prove the amount of the six bills under the commission against *Young* and *Glennie*, although the amount exceeded the balance due to

(a) 6 Ves. 449.

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them from *Kirkpatrick*. And Lord *Eldon* says in his judgment in that case, "If the petitioners can only prove the amount of their debt, they have not the full benefit of the security. It is not material that *Kirkpatrick* was indebted to *Young* and *Glennie*, for you cannot attach equities on bills of exchange."

As to the objection that *Hickman* had no power to make this deposit,—we say, that *Hickman* was not a mere agent in this transaction; but if he was, it would make no difference; for whether an agent or trustee, we contend he had the power to deposit it with the petitioners. [*Erskine*, C.J. *Hickman* does not state in his affidavit how he got the bill.] In whatever mode *Hickman* obtained possession of the bill,—if he obtained such possession legally, he had power to deposit it with the petitioners. For it has been decided, where an Exchequer bill (the blank in which was not filled up) had been placed for sale in the hands of a stock-broker,—who, instead of selling it, deposited it at his banker's as a security for advances to the amount of its value, and afterwards became bankrupt,—that the owner of the Exchequer bill could not maintain trover against the bankers; as the property in it, like bank-notes, and bills of exchange indorsed in blank, passed by delivery; *Wookey v. Pole* (a). Although the bill was not indorsed by *Hickman*, yet as the petitioners advanced him more than the amount of the bill, they have a right to prove against the estate of *Claughton*.

As to the objection, that the balance due at the time the bill was deposited has since been paid,—it is proved by two affidavits, that the intent of the deposit was to secure future, as well as past advances. The balance,

(a) 4 Barn. & Ald. 1.

therefore, that this bill was given to secure, has never been paid; for it was given to secure not only the balance then due, but all and any balances. [*Erskine*, C. J. Perhaps you might take it in this way,—that though the bill was originally deposited for a previous advance, yet that when a fresh advance was made, there was then a new contract of deposit, to cover the subsequent advance.] The bill was clearly deposited on a floating account; and must have been therefore intended to cover any subsequent advances.

Another question arises out of the rejection of this proof by the Commissioners, which is this,—is a party, applying to prove a debt, to be prevented from amending an affidavit, that he has already made in support of such proof? Now in regard to this objection, the affidavit was amended for the sole purpose of removing scruples raised by the Commissioners themselves, and in compliance with their express desire.

Sir *G. Rose*.—A difficulty strikes my mind, as to granting the prayer of this petition. On the 12th December you prove the amount of your balance under *Hickman's* commission, when you exhibit this bill, and except it as a security. The mode of your proof, therefore, under that commission is irreconcilable with what you now propose to do. If your statement in the petition is correct, the bill ought to have been sold, and you ought to have proved merely for the balance, after deducting the proceeds. Although you might have disposed of the bill, after the indorsement of the drawer, yet holding it as you did at the time of *Hickman's* bankruptcy, the question is, whether you are not trustees for his assignees. For as you did not make the

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of the fact, and had since discovered it. It is contrary to every principle of public policy to permit a party, for his own advantage, to contradict a former statement made by him upon oath. Accordingly, in *The East India Company v. Keighly*(a) it was decided that, on a reference to the Master to take the accounts between the parties, no evidence was admissible to contradict the answer of the defendant.

In the present instance, it is submitted that greater credence ought to be given to the first deposition of the petitioner made in 1826, when the circumstances of the transaction were fresh in his recollection, than to the subsequent one made in 1832. The deposition also under this commission is wholly inconsistent with that made under the commission against *Hickman*; for, if the petitioners had a right to prove this bill under *Claughton's* commission, they had no right to deal with it, as they have done, under *Hickman's* commission. What passed in 1826, when the first attempt was made to prove the bill under *Claughton's* commission, does not exactly appear; but the result is known, namely, that the Commissioners rejected the proof.

There is another ground of objection to proving this bill under *Claughton's* commission. It is expressly sworn in Mr. *Wagstaff's* affidavit, which was filed on the 17th January, that he was informed both by *Brand* and *Claughton*, that the bill was an accommodation bill. Yet neither the petitioner, nor *Hickman*, venture to take any notice of this fact. As this statement stands quite uncontradicted, the bill must be taken upon the evidence to be an accommodation bill; and no demand can, therefore, be made on it by the peti-

(a) 4 Madd. 16. .

tioners, except what *Hickman* could have made, which was none.

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Mr. *Montagu*, in reply. I never rose with more astonishment than on this occasion; for I really thought the case so clear, that the Court could have no difficulty in deciding the point in favour of the petitioners. The question is, whether the Commissioners were right in refusing the proof, on the grounds stated in the petition,—namely, that *Hickman* had no authority to deposit this bill of exchange for money advanced, and to be advanced,—that the balance owing when the bill was deposited had since been paid,—and that the petitioner had no right to amend his deposition. I contend, that the petitioners are not estopped from rectifying the error they were led into by their professional adviser. The bill for 1000*l.* was deposited by *Hickman* in 1823—he does not indorse it—the petitioners in 1825 prove the cash balance under *Hickman's* commission, excepting the bill as a security, instead of selling it, and proving for the residue. These are the facts,—now for the reasoning. First, as to the right of proof against *Claughton*. In *Ex parte Towgood*(a) it is laid down, that the distinction between the discount and the deposit of bills does not depend on the mere fact of indorsement, but whether it was the intention to make an absolute transfer, by giving full power to go against all parties on the bills,—or merely to enable the person with whom they are deposited to receive the amount from the other parties. In the present case, I contend that the bill was deposited as a general security, and not as a pledge. And, although I admit that the de-

(a) 19 Ves. 227.

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posit of a bill unindorsed raises a presumption that it was to be a pledge, yet, as Lord *Eldon* says in *Ex parte Towgood* (a), the circumstance of indorsement does not make a difference, if the real meaning was deposit; as the indorsement may be merely with reference to facilities in the remedies to be taken against the other parties. [*Erskine*, C. J. If the petitioners claim to prove as trustees for *Hickman*, then the state of the account between *Hickman* and *Claughton* will be very material; for it would be idle to permit the petitioners to prove as trustees for *Hickman*, when *Hickman* himself could not prove. I don't understand the distinction between a bill deposited as a security, and one deposited as a pledge. The question is here, whether the bill was transferred so as to pass the property in it,—or whether it was deposited merely as a security, or pledge, for a balance due; in which last case the property in the bill would not pass by the delivery of it.] Whatever claim the assignees of *Hickman* may have against *Claughton*, we have nothing on earth to do with. As *Hickman's* assignees are not before the Court, we are not bound to argue that question. This case is very different from that of *Ex parte Burn* (b).

Then as to the question, whether we are estopped by our former deposition. [*Erskine*, C. J. There is no doubt you are not estopped. The most analogous case is that, where, after a nonsuit in an action at law upon the testimony of one witness, the same witness is afterwards called upon a new trial, and gives dif-

(a) 19 Ves. 227.

(b) 2 Rose, 58; where it was decided that a creditor, who held four bills of exchange, and proved the amount as his debt, with a statement that he held the bills as a security, must, if any of the bills were subsequently paid by the other parties to them, deduct the amount so paid from the proof and the dividends.

ferent testimony from what he deposed to at the first trial. The question is then, whether the Court will not rather give credit to his first evidence, than his last.]

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The next point we contend for is, that this bill was deposited on a running account. [*Erskine*, C. J. That is the question. The Commissioners find, as one of the reasons for rejecting the proof, that the bill was deposited for previous advances.] With regard to the right of the petitioners to a lien on this bill for the amount of their subsequent advances, notwithstanding their previous advances had been satisfied, the case of *Atwood v. Crowdie*(a), already cited, is decisive. Then as to the proof of the fact, whether the bill was, or was not, deposited as a general security for *all* advances. *Britten* swears expressly, that the bill was deposited as a security for any floating balance, that was then, or might afterwards become, due. *Hickman* also swears to the same fact.

As to the question, whether it was an accommodation bill, or not,—admitting even that it was an accommodation bill, still that will not affect the rights of the petitioners. But I contend, that it was not an accommodation bill; and this point, moreover, not having been made before the Commissioners, the respondents cannot avail themselves of it on the hearing of this petition.

ERSKINE, C. J.—Some of the reasons given by the Commissioners for rejecting this proof, certainly, do not appear to carry much weight. I do not find any facts, which bear out the first reason, namely, that *Hickman*

(a) 1 Stark, 483.

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had no power to deposit the bill with the petitioners ; and the last objection, that the petitioners could not amend their deposition, I think not tenable. A creditor is certainly not estopped from doing so, after the rejection of his proof ; though I can very well understand, that the Commissioners might have thought that circumstance a matter of great suspicion. There seems no great difficulty, however, in deciding the point of law, as applicable to this case. In a pledge of goods, the depositary can have no right, which the party pledging them did not possess. But it is different with negotiable securities : where a party, by putting his name on a bill or note, enables another to deal with it as his own property. Now in this case *Hickman*, being possessed of a bill accepted by *Claughton*, and indorsed in blank, had a right either to pledge it, or transfer it by indorsement. He delivers it to the petitioners ; but the act of delivery being equivocal, the question is, for what purpose it was delivered. This is not a question between the acceptor and a stranger to the deposit, but between the acceptor and the depositary himself. If the bill was transferred by *Hickman* to the petitioners, so as to vest the property in them, the acceptor would of course be liable to them. But if it was merely deposited with them in the nature of a pledge, then their interest in the bill would cease, when the purpose for which it was deposited was satisfied. It seems to me quite clear, that this bill was deposited as a pledge ; and that the delivery of it to the petitioners was not for the purpose of transferring to them the property in it. The bills that were lodged by *Hickman* with the petitioners were never presented for payment by them ; and it is plain, that *Hickman* exercised a right of pro-

perty over them, by taking them away whenever he brought fresh bills. The main question is, for what purpose the deposit was originally made, whether for money due before, or for what might become due after the deposit. If it was made for previous advances, then all the interest of the petitioners in the bills would cease, as soon as the amount of those advances was paid off. The petitioners allege, that the bill was delivered to them to secure subsequent, as well as prior, advances. The Commissioners, however, find that the bills were deposited to secure the balance then due, and that that balance has been satisfied. Are they justified in that conclusion? If they are not, the Court will order them to rectify their error. What is the evidence? The original deposition made by *Britten* in 1825 states, that the bills were deposited for money advanced before the time of the deposit. Now can any one reading this deposition doubt for a moment that this would have been an incorrect statement, if the bill was really deposited to secure after advances? But he makes afterwards another deposition, in which he perseveres in calling the bill a collateral security for money then due; and then at last he makes a third affidavit, in which he swears that the deposit was not merely to secure monies then due, but also monies *to be advanced*. Now, are the Commissioners bound to believe this affidavit, in opposition to the two former ones? His recollection on the subject must surely have been better in 1825, than in 1832; and, without any impeachment of his veracity, he might afterwards have brought his mind to believe that the fact was different from what he first stated.

When this case was before the Court yesterday, it

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struck me, that although the bill might not be originally deposited to secure subsequent advances, yet that it might have been afterwards agreed between the parties, that it should be *left in the possession* of the petitioners for that purpose. But I do not think that the petitioners can avail themselves of such an agreement, after the bill became due, which was in August 1823. Upon any subsequent advance of money, there might certainly have been a fresh contract of deposit between the petitioners and *Hickman*, by which the former might agree to continue to hold all bills in their hands as a pledge. But if this was after the bill in question became due, it would be then material to inquire, what was the state of the account between *Hickman* and *Cloughton*. The petitioners, however, rest upon the terms of the *original* deposit, which they insist was to secure future, as well as previous, advances. Besides, the point I have alluded to,—as to a fresh deposit and a subsequent contract,—was never made before the Commissioners, and therefore cannot now be taken advantage of. It was perfectly open to the Commissioners, under all the circumstances, and comparing the different affidavits made by the petitioners, to draw the conclusion of fact; and I cannot say that the Commissioners have drawn a wrong conclusion, in rejecting the proof, on the ground that the bill was deposited for the balance then due of previous advances, and that that balance has since been paid. The depositions in this case are so contradictory to each other, as to raise suspicions in the mind of any reasonable man of the real truth of the fact, and to induce us to say that the Commissioners were well warranted in the conclusion they have come to. It is unnecessary to consider the other points, that have been

urged in the argument, as they have not been made out in evidence ; and my judgment proceeds on the ground, that the Commissioners were not wrong in the conclusion they have drawn from the state of facts before them.

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Sir J. Cross.—Upon first reading this petition, I thought that the petitioners had not made out their right to prove this bill under *Cloughton's* commission; but not for some of the reasons assigned by the Commissioners. I was therefore desirous to hear what argument the counsel for the respondents had to urge against the petition. The Commissioners first say, that *Hickman* had no right to pledge this bill. But this I take to be quite clear,—that though the Commissioners made this a ground for rejecting the proof, the assignees do not pretend that *Hickman* had no right to deposit this bill to secure any pecuniary advances, but merely call in question the terms of the deposit. The second reason assigned by the Commissioners for their rejection of the proof is, that the bill was deposited to secure a previous balance then due, which balance had been subsequently paid. This is, of course, entirely a question of fact depending upon the evidence. The third reason of the Commissioners is, that the petitioners could not amend their deposition. I think the Commissioners were wrong on this point, and am rather surprised that the respondent's counsel should have laid such stress upon it. With respect to the terms on which the bill was deposited with the petitioners, there does not appear to have been any express contract on the subject; and therefore it can only be inferred from the course of dealing between the parties. I do not

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throw out any imputation against the petitioners, that they meant to state their case untruly, when I express an opinion, that in order to arrive at the real truth of the case, it is the duty of the Court, notwithstanding the deposition of Mr. *Britten*, to look to the mode in which these parties dealt together. *Hickman* brings various bills of exchange to the petitioners, which he deposits with them to secure pecuniary advances; but he does not indorse the bills, nor is any one of them ever negotiated or presented for payment by the petitioners; but, on the contrary, they are kept by them until *Hickman* either repays the amount of the advances, or deposits other bills in exchange to cover the balance due. Now, one of the terms of the deposit might be, that the bills should not be presented to the acceptors for payment; but whether that was so or not, the retention of this bill by the petitioners, after it became due, only gives them the same right against *Claughton* the acceptor, that *Hickman* himself possessed. The petitioners kept this bill from August 1823, when it became due, to the year 1825, without making any demand against *Claughton*; alleging, that they were ignorant of his bankruptcy,—an event which was notorious throughout England. This is certainly a very extraordinary fact which the petitioners have asserted, and induces me to watch their case with the greatest vigilance. Two years after the commission issues against *Claughton*, application is made by the petitioners to prove this bill for 1000*l.* under his commission. The Commissioners rejected the proof. The petitioners slept upon the matter for a period of six years afterwards; and then altered their deposition, so as that the Commissioners might draw an inference of

their course of dealing with *Hickman*, contrary to the statement in their former deposition. . But I think that the first inference they drew was the correct one, and I concur with the Commissioners in their second reason for rejecting this proof. If the petitioners had come earlier, instead of waiting nine years to assert their claim on this bill against *Claughton's* estate, I should have been disposed to send the case back to the Commissioners for further inquiry. But, under all the circumstances, I think it right we should end the matter here.

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Sir G. ROSE.—It is clear, upon the petitioners' own statement, that they had no right to any assistance from us, in support of their claim to prove this bill under *Claughton's* commission. It will not be disputed, that in 1825, when the Commissioners rejected the proof, they were *functi officio*; and when it was brought before them again in 1832, they very properly referred the matter for the consideration of this Court. When the petitioners therefore come before us this day, stating, that they have discovered material circumstances that will give them a stronger right of proof against *Claughton's* estate, I think the Court should require a stricter explanation of the reasons for their delay in urging this claim, than what the petitioners have here assigned. And even if we granted the indulgence they asked, the utmost extent of the order they could obtain, on the prayer of this petition, would be, upon payment of all costs incurred by the assignees. But what is the order, which the Court can make on the facts, as they appear in evidence between these parties? I will venture to say, there is no man in business

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dealing with these securities, who is not as competent to judge of the matter, as any lawyer. The holder of a bill not due can, no doubt, *prima facie*, pass a good title to it by transferring it to any other person. But the question is, in this case, how a Court of Bankruptcy, combining the principles of law and equity, can say that this bill has been so transferred by *Hickman* to the petitioners, as to vest in them the absolute property in it. It is established in every day's practice, that when a bill is proved to have been obtained from the acceptor by duress, or gaming, or usury, the indorsee, though he had no notice of that fact, is bound to go into the consideration which passed between himself and the indorser; and the convenience, that has been found to arise from acting on this principle, has sanctioned the practice. In the deposition made by *Britten*, when he first tendered the proof of himself and his partners on this bill, he states, "that the bill was by the said *E. Hickman* delivered to him and his partners, as a collateral security for money *before that time lent and advanced* by them to the said *E. Hickman*, to more than the full amount of the said bill of exchange." And this deposition was made, after the deliberate attention of his mind had been called to an explanation of the transaction, in order to found his right of proof. Now, supposing that *Cloughton* had continued solvent, and that the petitioners had brought an action at law against him on this acceptance, would any Court of equity, on a bill filed by him for relief under these circumstances, refuse to grant an injunction to prevent the petitioners from proceeding in the action? This bill being deposited by *Hickman* with the petitioners, as a collateral security for advances previously made by them to him,—and *Hickman* continuing solvent for nearly

two years after *Claughton* had become bankrupt,—are we not to presume, either that the money was paid, to secure which the bill was deposited,—or that the petitioners obtained for *Hickman* another bill in satisfaction of this bill on *Claughton*? Let me request the attention of any gentleman conversant with the rights of parties in transactions of this description, and I will ask him, whether the questions put by the Commissioners were not most important, as to the right of proof claimed by these petitioners under *Claughton's* commission. The Commissioners desired to know, first, on *what specific transaction* the bill in question came into their hands; secondly, when the bill was paid by *Hickman* to them; thirdly, whether they ever applied to *Claughton* for payment of the bill before his bankruptcy; fourthly, whether *Hickman* was not also a bankrupt, and when he became such. In answer to the first of these inquiries, the petitioners state in their subsequent deposition merely what they had stated in their former one, swearing, in general terms, that the bill was delivered to them by *Hickman* on the 27th May 1833, as a collateral security for money before that time lent and advanced by them to *Hickman*, to more than the full amount of the bill. Now this is no satisfactory explanation, to my mind, of what the Commissioners wished to know, namely, *on what specific transaction* this bill was delivered to them by *Hickman*. Looking, therefore, at all the circumstances of the case, and at the vague and ambiguous answer made by *Britten* to the inquiries of the Commissioners, I think they very properly rejected the proof. The lapse of time, too, before any claim was made by the petitioners on this bill under *Claughton's* commission, is, of itself,

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sufficient to induce the Court not to interfere with what the Commissioners have done. In *Britten's* last affidavit, made seven years after the former one, he, for the first time, states that the bill was deposited by *Hickman* as a collateral security, *as well* for money before that time lent and advanced by the petitioners to him, as also for all sums of money which should be *thereafter* advanced. Now, supposing the bill to have been really deposited to secure future advances, in what way ought we to consider this subsequent deposition? The effect of the affidavit made by *Hickman* in this matter is, that no consideration passed between *Hickman* and *Claughton*, when *Claughton* delivered to him this bill. Then, even taking it for granted that *Hickman* deposited this bill to secure future advances, what right had he to continue it as a deposit with the petitioners, or to bind *Claughton* on his acceptance, after it became due. A bill accepted without any consideration passing to the acceptor, and deposited, or suffered to continue as a deposit, with a third person, after it has become due, and without the consent of the acceptor,—what value, as against the acceptor, could either a court of law or equity say the holder ought to claim on such a bill? When I consider, therefore, the length of time that elapsed before the petitioners made any claim against *Claughton* on this bill,—the unsatisfactory explanation given by them to the inquiries of the Commissioners,—and the absence of all evidence, as to any value given by *Hickman* to *Claughton* for his acceptance,—I am not at all disposed, on this occasion, to impeach the decision of the Commissioners.

Petition dismissed, with costs.

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Ex parte TODD.—In the matter of *TODD*.

Southampton
Buildings,
February 26.

THIS was a petition to annul a fiat, on the ground that the petitioning creditor's debt was fraudulently contracted.

The Court will not order a petition to stand over, to enable a respondent to file affidavits in rejoinder, without first hearing the affidavits in reply read, to see whether they require an answer.

Mr. Montagu, and *Mr. Bethell*, who appeared for the petitioning creditor, applied that the hearing of the petition might stand over, to enable him to answer certain imputations made against him in the affidavits in reply, which had been made by the petitioner in support of the petition. The affidavits in answer to the petition were filed between the 7th and 12th February; and the affidavits in reply, which were seven in number, and contained much new matter, were filed on the 21st February, and office copies of them only obtained on the 22d; so that, as the parties lived at Cheltenham, there was not sufficient time to be prepared with affidavits in rejoinder.

Mr. Swanston, who appeared for the assignees, joined in the application.

Mr. Wakefield, and *Mr. G. Richards*, on behalf of the petitioner, opposed the application, contending, that the matter in the affidavits alluded to was merely in reply to the allegations, which were contained in the affidavits made by the respondents in answer to the petition.

The COURT thought it right that the case should be first heard through, as already stated on affidavit; and that it would be then for the Court to judge, whether there was any necessity for the respondents to file fresh affidavits in rejoinder.

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The petition finally stood over, with a view to a reference, which was recommended by the Court; an Order being made to suspend all proceedings in the meantime, with liberty for either party to apply to the Court.

Ex parte THOMAS CUNNINGHAM, and ANDREW GALLOWAY HUNTER.—In the matter of JOHN MABERLY.

Same day.

A London banker, having a branch bank at Edinburgh, stops payment on the 2d January; and writes to his agent at Edinburgh, apprising him of the fact, and directing the business of the branch bank to be discontinued. On the 4th January, before this notice reaches the agent, the petitioner pays into the Edinburgh bank 305*l.* 15*s.* in notes and cash, to be remitted to the house in London; but after the news reaches Edinburgh, and whilst the notes were still in the agent's possession, gives him notice not to part with them; and they remained in his hands on the 26th January, when a fiat issued against the banker in London. The agent at Edinburgh having a lien on the funds in his hands, the assignees permitted him to retain the 305*l.* 15*s.* in part satisfaction of his lien. Held, that the assignees were bound to refund this sum to the petitioners.

THIS was the petition of two creditors of the bankrupt, praying that the assignees might be ordered to pay to them the sum of 305*l.* 15*s.* out of the bankrupt's effects, under the following circumstances (*a*).

The bankrupt for many years carried on business as a banker in London, under the firm of *John Maberly and Co.*; and had a branch bank of deposit in Edinburgh, of which his agent, *Mr. James Blyth*, was a manager; and he had also other branch banks of deposit in various towns in Scotland.

On the 2d January 1832 *Maberly* stopped payment at his banking house in London; and on the same day sent letters by the post to *Blyth*, and his other agents, in Scotland, informing them that he had stopped payment, and directing that the business of the branch banks should be discontinued.

The letter addressed to *Blyth* did not, in due course

(*a*) The facts of this case are stated from those in the special case, which was settled by his Honor the Chief Judge, and was afterwards argued, on appeal, before the Lord Chancellor. See *post*, p. 87.

of post, arrive in Edinburgh until two o'clock in the afternoon of Wednesday the 4th January 1832, and was delivered between three and four o'clock in the same afternoon. In the forenoon of that day, and before the letter, or any other information of *Maberly's* having stopped payment, had reached Edinburgh, the petitioners delivered at the bank at Edinburgh, to *Blyth*, as the agent of *Maberly*, three bankers' promissory notes, each for the sum of 100*l.*, of the firm of *Forbes, Hunter, and Co.*, bankers, at *Edinburgh*, payable to bearer on demand,—and five promissory notes of another Scotch banking company, for the sum of 1*l.* each, also payable to bearer on demand,—and the sum of 15*s.* in silver coin; for the purpose of having the amount remitted to London, to be paid at the bank of *Maberly* there, according to the order of the petitioners; which *Blyth* undertook to do, and accordingly gave the petitioners four several orders upon *Maberly* in London for several sums, amounting together to 305*l.* 15*s.*

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Blyth, at the time he received *Maberly's* letter, had in his hands the promissory notes so delivered to him by the petitioners; who, as soon as they heard of *Maberly's* failure, and before the departure of the post for London, and also before the notes had been appropriated, or carried to account between *Blyth* and *Maberly*, gave notice to *Blyth* not to part with the money and notes so delivered to him; and the same were accordingly retained by, and were in the hands of *Blyth*, at the time of the issuing of the fiat against *Maberly*. On the 11th January a petition was presented to the sheriff of *Edinburgh* by the petitioners, praying the sheriff either to decree *Blyth* to remit the amount

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of the notes to a responsible banker in London, for the purpose of being applied as directed,—or to ordain *Blyth* to repeat and pay back the same to them, and in the meantime to interdict him from putting away, or disposing of, or altering the state of the said notes till the further order of the Court. The sheriff appointed that petition to be answered, and in the meantime granted interdict, as craved.

Several other persons, who had in like manner delivered money and notes to *Blyth*, obtained interdicts of a similar nature.

On the 26th January 1832 a fiat in bankruptcy issued against *Maberly*, under which he was duly declared a bankrupt, and the respondents were appointed assignees.

At the date of the fiat *Blyth* had in his hands two several sums of 3,925*l.* 6*s.* 6*d.*, and 2,876*l.* 16*s.* 3*d.*, making together the sum of 6,802*l.* 2*s.* 9*d.* The sum of 3,925*l.* 6*s.* 6*d.* was the amount of notes and monies which had been received by him as *Maberly*'s agent at Edinburgh, including therein the notes and cash that had been delivered to him by the petitioners. The other sum of 2,876*l.* 16*s.* 3*d.* was the amount of remittances made to *Blyth* by *Maberly*'s other agents in Scotland, subsequent to the 4th January, for the purpose of being transmitted by *Blyth* to *Maberly* in London.

The assignees of *Maberly* claimed from *Blyth* all the funds in his hands, as agent for the bankrupt. *Blyth* resisted this claim; first, on the ground of the pending adverse claims and interdicts above mentioned; and, secondly, because he claimed a right to retain, out of the monies in his hands, a sum of 4,424*l.*

12s., as the amount of a debt due to him from *Maberly*, for monies lent and advanced, and interest. And thereupon certain proceedings were had in the Court of Session in Scotland; and, amongst others, a petition was presented by the assignees to the first division of that Court, insisting that they were entitled to all the funds in his hands as *Maberly's* agent; to which, on the 11th June, answers were put in by the petitioners, and various other claimants.

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The matter having come on to be heard before the Court of Session on the 11th July last, by an interlocutor of that date, it was decreed and ordained as follows:—"The Lords having resumed consideration of this petition, and advised the same, with answers thereto, and minute, for the Commercial and National Banks of Scotland, and heard the counsel for the parties,—in respect that the question, raised by the various applications for interdict by the several parties mentioned in this petition, is not strictly or legally a question of vindication of property, but a question of preference on funds legitimately in the possession of *James Blyth*, as agent and manager for the bankrupt, and which will be most properly discussed and determined under the proceedings in bankruptcy in England, decern and ordain the said *James Blyth* to pay and deliver to the petitioners, the assignees of the estate and effects of the bankrupt, *J. Maberly*, or their mandatories, the whole bank notes and other monies and effects in his hands, as agent for the said *J. Maberly*, after deducting, in the meantime, the sum of 4,424l. 12s., for which he claims a right of retention; and reserves to all parties their respective rights and claims of preference, to be insisted on in due form of pro-

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ceeding in England ; find the said *James Blyth* entitled to the expenses incurred by him in defending the fund, and reserve his claim for the same, as it shall be taxed by the auditor in the final accounts between him and the assignees."

No further proceedings were taken by the assignees against *Blyth* ; but, by an arrangement made between them, it was agreed that *Blyth* should retain the said sum of 3,925*l.* 6*s.* 6*d.*, part of the said sum of 6,802*l.* 2*s.* 9*d.*, in part payment of his said debt ; and that he should pay over to the assignees the balance of the said other sum of 2,876*l.* 16*s.* 3*d.*, after deducting the amount of costs, to which he was entitled under the said decree of the Court of Session. In pursuance of this arrangement, *Blyth* accordingly retained the said first-mentioned sum, and afterwards paid to the assignees the sum of 2,697*l.* 0*s.* 7*d.*, being the balance of such latter sum, after deducting the costs ; but the present petitioners, Messrs. *Cunningham* and *Hunter*, were no parties to this arrangement.

The petitioners therefore prayed, that the assignees of *Maberly* might be ordered to deliver or pay unto them the said sum of 305*l.* 15*s.* so delivered and paid by them to *Blyth* ; and that the costs and damage of the petitioners, sustained by them by reason of the claim made by the assignees to the money or notes, might be made good to the petitioners out of the estate and effects of the bankrupt ; and that for such purpose it might be referred to the Registrar to compute interest on the said sum of 305*l.* 15*s.* from the time the same was so deposited as aforesaid, up to the time when the same should be received by the petitioners ; and also to inquire and state what costs have been

incurred by them, in or by reason of the several proceedings of the Courts in Scotland; and that the amount of such interest and costs might be paid to them out of the estate of the bankrupt; and that the petitioners' costs of, and incidental to, this petition, might be also paid to them out of the bankrupt's estate.

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Mr. *Bethell*, and Mr. *Paynter*, appeared in support of the petition, which when they had opened, the Court called on

Mr. *Swanston*, and Mr. *Montagu*, who appeared for the assignees. It was sworn, in answer to the petition, that *Blyth*, after the money was delivered to him by the petitioners, gave them orders for the amount on *Maberly* in London; and that the notes and money delivered to *Blyth* by the petitioners were by him immediately mixed with the other funds of the bankrupt then in *Blyth's* hands. Between the 2d January, when *Maberly* stopped payment, and the 4th, various transactions took place between *Blyth* and the petitioners; and those might just as well be impeached as the payment of these notes. The question is, whether this Court can decide the matter of this petition in the absence of *Blyth*, in whose possession the property remained by order of the Scotch Court. *Blyth* is a creditor of *Maberly* to the amount of 4000*l.* and upwards, and therefore claimed a lien on the notes paid to him by the petitioners. By the order made by the Scotch Court, *Blyth* was authorized to retain the amount of his lien. The notes remained in his hands, therefore, not as the agent of the assignees, but as the creditor of *Maberly*, claiming against the assignees.

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The assignees have not had any credit from *Blyth*; but there has been merely a conditional arrangement between them. *Blyth*, however, is not before the Court; and unless it has all the parties interested before it, it cannot proceed with this petition. [*Erskine*, C. J. The assignees having come to an agreement, that the notes should be retained by *Blyth* in account with them as assignees; they have in fact been appropriated by the assignees, and *Blyth* has now nothing to do with the matter.] If the petitioners have any claim to this money, *Blyth* is the person who is properly answerable to them. In the case of *Ex parte M'Gae*(a), where a customer agreed to pay into a bank of four partners bills of exchange indorsed, and to take in return their promissory notes; and after three out of the four partners became bankrupt, the bills were then paid in, and their notes taken, and then the fourth became bankrupt; it was held, that the assignees were not entitled to retain these bills. But the ground, upon which Lord *Eldon* decided that case, was upon the construction of the particular contract, by which the customer was to receive, as the consideration for his delivering them the bills, the notes of the solvent four partners, and not the notes merely of one solvent partner and the assignees of the others. "In this view of the case," Lord *Eldon* says; "the relation of debtor and creditor never subsisted prior to the bankruptcy, and the consideration failed, upon which alone the bills were parted with." But in the case now before the Court, there is no such special contract. The notes were paid in the usual way into the Edinburgh bank, and the petitioners received orders for the amount on

(a) 1 Rose, 376; 19 Ves. 609.

Maberly in London. The case of *Ex parte M'Gae* is, indeed, not very applicable to the facts in this petition, but as it may be relied on by the other side, it was proper to refer to it. [*Erskine*, C. J. I do not think the case so very irrelevant.] [Sir *J. Cross* referred to *Thompson v. Giles* (a), where a customer having indorsed and paid into his bankers bills not due, with liberty to draw for the amount, and the bankers became bankrupts, it was held, that the customer might maintain trover against their assignees for such bills as remained in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy.] The petition in this case, however, proceeds upon a principle which cannot be sustained; for it prays that, in addition to the notes, the fifteen shillings may be delivered to them. Now, as there can be no ear-mark on money, this part of the prayer is quite untenable. But the transaction between these parties is very different from the cases of short bills. The transaction here was complete by the petitioners' delivery of the notes, on the one hand,—and the delivery to them of the orders, on the other; there was a regular exchange of paper, and, as there was no fraud, the contract was binding. [Sir *J. Cross*. Was not this money paid in by the petitioners to *Blyth's* hands, in ignorance of the fact of *Maberly's* bankruptcy, which, *ex æquo et bono*, the assignees ought to refund?] [Sir *G. Rose*. The petitioners never parted with sixpence, until after the act of bankruptcy.] The agency of *Blyth* was not *ipso facto* determined by the bankruptcy of his principal, but only from the time when he had notice of that fact.

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(a) 2 B. & C. 422.

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For if it were so, every payment made by and to *Blyth* on the 3d and 4th January, might be recovered back. [Sir *J. Cross*. In the affidavit made by *Abraham Donald*, in support of the petition, it is expressly sworn that *Blyth* had in his hands, at the time of the bankruptcy, funds of the bankrupt exceeding the amount of his lien. I understand, that the assignees voluntarily left these notes in his hands, and took others instead.] The assignees have not received a farthing from *Blyth*; they have merely settled the account. All the remittances which *Blyth* received previous to his knowledge of the bankruptcy of *Maberly*, he claimed to retain,—all those received since, he returned. This petition is presented, on the supposition that the assignees have received the amount paid to *Blyth* by the petitioners; but that is not the fact, and therefore they are not to be charged as if they had, unless through their wilful default; and this last question is not now before the Court. The payments and receipts of *Blyth*, between the act of bankruptcy of *Maberly*, and *Blyth*'s knowledge of the act of bankruptcy, are good, and cannot be impeached; and therefore the sum paid to him by the petitioners cannot be recovered back by them, after they received from him the order on *Maberly* in London, in exchange for the notes they delivered to him.

ERSKINE, C. J.—This is an application on the part of Messrs. *Cunningham & Co.* to have the sum of 305*l.* 15*s.* repaid to them by the assignees, which the petitioners allege they paid to *Blyth*, an agent of the bankrupt's, on the 4th January, after *Maberly* had committed an act of bankruptcy, the petitioners being

ignorant of that fact; and the question is, whether these notes, so paid in by them, became the property of the bankrupt, so as to pass to his assignees. Now it appears, that on the 2d January *Maberly* stopped payment; and the first point to consider is, whether, after *Maberly* committed an act of bankruptcy, these notes, delivered to his agent for a particular purpose, became part of his general assets, to be divided among his creditors. Can you carry the transaction higher, than by treating it as a payment to *Maberly* himself? Then could any property in these notes pass to the assignees, if they had been delivered to *Maberly*, for a particular purpose, two days after he had committed an act of bankruptcy? It is stated, however, that *Maberly's* assignees have never received the amount of those notes; but that *Blyth* has retained them in his possession, since they were delivered to him by the petitioners. But, though the assignees have not received these identical notes, they have received the same advantage as if *Blyth* had actually remitted them. For having been allowed to retain them in liquidation of his lien, he can therefore only prove so much the less against *Maberly's* estate; and the result is precisely the same, as if he had handed over the notes to the assignees. It would, indeed, be the greatest possible hardship to the petitioners, if the assignees were allowed to set up this defence, when *Blyth* never received the notes until two days after *Maberly* had committed an act of bankruptcy. The assignees have authorized *Blyth* to retain the notes, and therefore they ought to pay the amount to the petitioners.

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Sir J. CROSS.—It does not appear in this case, that

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the assignees have literally received these notes into their own hands; but the question is, whether they have not so dealt with them, as to amount to the same thing. Now, according to the evidence before us on affidavit, it is clear that the assignees have so dealt with these notes, that they have obtained the same benefit as if they had actually received them; and that they have so mixed themselves up with this transaction, as to have made themselves responsible for the amount of the notes. It appears, that the petitioners delivered these notes to *Blyth*, for the express purpose of being remitted to *Maberly* in London; and that *Blyth* undertook to remit them, and that the amount should be paid according to the order of the petitioners. It is clear, that the notes were handed to *Blyth*, in the belief that *Maberly* was still carrying on business as a banker in London, and capable of paying the amount to the petitioners, or their order. But it turned out, that *Maberly* had two days previously declared himself insolvent,—a circumstance which was entirely unknown to the petitioners, at the time of their transaction with *Blyth*. The notes, therefore, were delivered by them under a mistake of fact, and the petitioners are not divested of their property in them. It has been urged, as the notes were still in specie when they were demanded back from *Blyth* by the petitioners, that the proper remedy for the petitioners would have been to bring an action of trover against *Blyth*; or, if they had been converted into money, then that an action for money had and received might have been maintained against them. The assignees, however, have adopted the acts of *Blyth*; and as the bankrupt's estate has derived a benefit from the retention of these notes by *Blyth*, to

the full value of the amount, the assignees must refund the money to the petitioners.

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Sir G. ROSE.—If it could be supposed, that a Court of Justice could for one moment lend its sanction to the assignees of a bankrupt retaining another person's money, which had come to their hands under the circumstances of this case, it might with equal justice be called upon to sanction the obtaining money under false pretences. The case cited by Mr. *Montagu* related to short bills; and Lord *Eldon* always thought that these should be given up by the assignees. With regard to the present case, it is in indisputable evidence before us, that a satisfactory act of bankruptcy was committed by *Maberly* on the 2d January; and not only so, but that he wrote to his agents in Scotland by that day's post, announcing to them that he had committed an act of bankruptcy; in consequence of which, therefore, the agency was determined. Now, what satisfaction could be obtained by these petitioners, if they are not entitled to have these notes returned to them? They could not prove under the fiat against *Maberly*, because the delivery of the notes was after the act of bankruptcy; and the amount of them would be equally lost to the petitioners as if they had been robbed of them on the highway. It has been contended, however, that *Blyth* ought to have been before the Court, as he was the person answerable to the petitioners, having claimed a lien on the notes, and having never remitted the amount to the assignees. But the Court is not called upon to meddle with this question, nor does it in any way affect the rights of the petitioners.

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The ORDER made was, that the assignees should, within one week after they should have been personally served with the order, pay to the petitioners, out of the bankrupt's estate and effects, the sum of 305*l.* 15*s.*, the amount of the notes and cash paid by the petitioner *J. Blyth*, but such payment to be without prejudice to any question between the assignees and the representatives of *J. Blyth* touching such sum. And the assignees to be at liberty to use the names of the petitioners in any proceedings against them relating to the said sum, on indemnifying the petitioners from all costs which they may incur by reason thereof; such indemnity to be settled by the officer of the Court, in case the parties differed about the same. The petitioners and assignees to have their respective costs out of the bankrupt's estate; the costs of the assignees to be taxed by the Commissioner acting in the prosecution of the fiat. The petitioners not to be precluded from making in the Court of Judicature in Scotland such application as they should be advised, as to the costs alleged to have been incurred by them in respect of the matters in the petition (a).

Southampton
Buildings,
March 8.

An application
for a re-hearing
must be by pe-
tition, and not
by motion.

Mr. Swanston, and Mr. Montagu, now applied to the Court, by motion, for an order to re-hear this petition, on the ground that they had fresh evidence to adduce on the part of the assignees, which they were not

(a) See *Ex parte Belcher*, post, p. 87.

prepared with at the former hearing; and that the order then made was not yet drawn up.

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Ex parte
CUNNINGHAM
and another.

The COURT said, that an application for a re-hearing must be by petition, and not by motion; but that if the assignees chose to present a petition for that purpose, they were entitled to a re-hearing upon this statement.

The assignees accordingly presented a petition, praying that the former petition might be re-heard, that the order made on that petition might be reversed, and that the petition itself might be dismissed with costs.

Westminster,
May 2.

When a petition for re-hearing states new facts, it should be in the nature of a supplemental petition; and the original petition should be set down for hearing at the same time.

Mr. Montagu, and Mr. Bligh, appeared in support of the petition for re-hearing.

Mr. Bethell, and Mr. Paynter, *contrà*. There are two objections to this petition. 1. That the new matter is not material; and 2. There is no suggestion that the assignees were prevented from bringing this matter forward on the former hearing, or that it was discovered since the former hearing. In *Ord v. Noel* (a) it was held, that in order to entitle a party to file a supplemental bill, in the nature of a bill of review, it was necessary that the new matter should be discovered after the decree,—or, at least, after the time when it could have been introduced into the cause, and that the matter must be material, as well as new. So in *Wylde v. Ward* (b), the Court of Exchequer held that the

(a) 6 Madd. 127.

(b) 2 Y. & J. 381.

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Ex parte
CUNNINGHAM
and another.

party applying for a re-hearing was bound to show, that he had used reasonable diligence to discover the new evidence before the former hearing. And where proper means to procure the new evidence had not been used previously to the decree in a suit for tithes, the Court of Chancery refused to allow a supplemental bill in the nature of a bill of review, in order to introduce it; *Bingham v. Dawson* (a).

ERSKINE, C. J.—There were some allegations in your petition, which the assignees should, certainly, on the former occasion have been prepared with affidavits to deny.

Sir G. ROSE.—The rule, that applies to new trials of actions, and re-hearings of suits in equity, is not so inflexible in proceedings in bankruptcy, where there is not such strictness as in matters of pleading; for petitions in bankruptcy are not recognized as the deliberate acts of any professional person, but as the statement of the party presenting the petition. But I think, in this case, that the new facts ought to have been put into a supplemental petition. In strictness, this petition ought to be dismissed with costs; for the original petition should have been set down to be heard along with a supplemental petition.

The COURT finally ordered, that the assignees should pay the costs of the day, with liberty for them to amend this petition, or present a supplemental petition; that the service of the petition should be dispensed

with, and that the affidavits already sworn might be used on both sides.

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Ex parte
CUNNINGHAM
and another.

Westminster,
May 7, 1834.

On a petition
for a re-hearing,
the party who
presents such
petition, opens
the case.

The former
order in this
case confirmed.
See *ante*, p. 70.

The assignees having presented a supplemental petition, pursuant to the order of the Court, it came on this day for hearing, with the re-hearing of the original petition.

The new matter stated by the assignees in the supplemental petition was as follows. That although the bankrupt suspended his payments in London on the 2d January 1832, yet that his banking-house there was opened as usual upon and subsequent to that day; and that he did not absent himself therefrom, or refuse to be seen by his creditors; it not being his custom to attend at the banking-house, but to refer any persons who wished to see him to his house in John Street, Berkeley Square, which was done upon and subsequent to the 2d January. That the act of bankruptcy, upon which *Maberly* was declared a bankrupt, was not committed before the 26th January, when he absented himself from his dwelling-house, and was denied to his creditors. The assignees denied that the estate of the bankrupt had received the same benefit of the sum of 305*l.* 15*s.*, as if it had been actually paid to them; and they stated that the representative of *Blyth*, who was dead, had agreed to remit a balance to the assignees of 585*l.* 6*s.* 5*d.*, and to prove upon the bankrupt's estate for so much of the debt of 4424*l.* 12*s.*, owing to *Blyth*, as should not be satisfied by the funds of the bankrupt in *Blyth's* hands on the 4th January 1832. And the assignees contended, that the bankrupt's estate would not be in any way benefited by the sum of 305*l.* 15*s.*

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and another.

remaining with *Blyth*; because the petitioners would be entitled to prove the amount under the commission; and if it should not remain with *Blyth*, but be paid over to the petitioners, then that the representatives of *Blyth* would be entitled to add the amount to his debt.

A doubt having arisen, as to which side should commence the argument on the re-hearing,

The COURT said, that the appellant always commenced, on an appeal in bankruptcy; and that the same rule would apply to a party who petitioned for a re-hearing.

Mr. *Swanston*, and Mr. *Montagu*, for the assignees. If we were called on to give any opinion as to *Blyth's* right, we should advise that he had a right to retain the money deposited by *Cunningham*, as a lien for the debt of the bankrupt, provided it were received by him before notice of the act of bankruptcy. That, however, is not the question now before the Court; neither is it a question, whether *Cunningham* has a right to call on *some* party for the repayment of the sum paid in by him. But the real point for the Court to decide is, how far the *assignees* are to be called on to repay this money, they never having actually received it. Assignees can hardly be called on to repay that which has never come to their hands, when there is no imputation against them of any wilful default.

ERSKINE, C. J.—You are not quite correct in stating that the assignees have never received this money. Did they not so far receive it, and derive a benefit from it, as to pay off part of *Blyth's* debt with

it? and have they not, in fact, admitted *Blyth's* debt to be thereby reduced? Suppose this were an application for delivery up of short bills, which *Cunningham* had deposited with his bankers, would it not be a complete answer to the demand, that one of the bankers' clerks having obtained possession of them had refused to deliver them up, under a claim of retention for a debt due to him from his principal?

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Ex parte
CUNNINGHAM
and another.

The counsel for the petitioners (the respondents on the re-hearing,) were not called upon to address the Court.

ERSKINE, C. J.—We are of opinion, that the former order made at the original hearing of this petition is the correct order; and we cannot think, either that the facts which have been introduced into the supplemental petition,—or whether the act of bankruptcy took place on the 2d, or the 24th January, have any bearing upon the question, so as to alter the rights of the petitioners. *Cunningham* on the 4th January pays into *Blyth's* hands, as the agent of *Maberly*, 305*l.* 15*s.* in notes and cash, to be remitted to London. But subsequently thereto, on the very same day, and before the post went out, *Cunningham*, having got intimation of *Maberly's* stoppage, expressly forbids the transmission, and recalls all *Blyth's* powers over the property. *Cunningham* then gets an interdict from the Scotch Sheriff's Court, whereby the transmission is stayed. If the assignees had kept themselves entirely aloof from any interference as to the property in question, we might have considered it our duty to come to a different determination. But instead of doing so, and while the property was in

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—
Ex parte
CUNNINGHAM
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Blyth's hands under the interdict, and open to the litigation between him and *Cunningham*, the assignees step in and claim the property by their proceedings in the Court of Session; they do not repudiate it, and say it is solely a question between *Cunningham* and *Blyth*, but they claim it as *Maberly's* property. The assignees then, under advice, adopt *Blyth's* claim of lien, and petition the Court of Session to have the balance in *Blyth's* hands paid over to them. And although they do not get actual possession of the money,—yet, by allowing *Blyth* to set it off against his demand on *Maberly*, they clearly treat it, and use it, as though it were the property of *Maberly*; and they cannot now turn round and say, they have never received it.

Sir J. CROSS.—It is admitted, that *Cunningham* has a right to be repaid this money by some person or other. The money has been retained, as the money of the bankrupt; and it is only in that right, that the assignees interposed between *Cunningham* and *Blyth*, and caused *Blyth* to retain it in his own hands. The assignees petition the Court of Session, and obtain a decree in favour of their claim to this property, subject however to *Blyth's* lien. They then settle accounts with *Blyth*, allowing him to retain the money in question, towards the discharge of his lien. This is a clear adoption of and dealing with the property, as though it belonged to *Maberly*; and my mind is much more satisfactorily made up upon the subject by this re-hearing, than it was on the former occasion.

Sir G. ROSE concurred.

The petition for re-hearing was therefore dismissed, with costs, and the former order was confirmed (a).

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Ex parte
CUNNINGHAM
and another.

(a) See *Ex parte Belcher*, post, p. 87; where this case was again argued, on appeal to the Lord Chancellor, who also confirmed the order.

Ex parte BENJAMIN SOLOMONS.—In the matter of
JOHN MABERLY.

Westminster,
May 8.

THE petitioner in this case had, on the 4th January 1832, delivered to *Blyth*, as the agent of *Maberly*, the sum of 185*l.* in Scotch bank notes, for the express purpose of being remitted to London, and of being paid there to *Elizabeth Solomons*, which *Blyth* undertook to remit accordingly. The only difference in the facts of this case, from those of the preceding one of *Ex parte Cunningham*, were, that the notes were not identically specified in the petition.

The same order made, as in *Ex parte Cunningham*, ante, p. 58; although the notes delivered to the banker's agent were not identified.

Mr. *Swanston*, and Mr. *Montagu*, for the assignees. As the petitioner in this case has not identified the notes, he is entitled to no order to reclaim them. The transaction was nothing more, nor less, than a sum of money paid into a banker's by a customer, although devoted to a particular purpose. This brings the case, therefore, within the principle of *Scott v. Surman* (b), where it was determined that money in the hands of a bankrupt, which ought to have been, but was not, devoted to the purposes for which it came to his hands, could not be distinguished or separated from the rest of his property,—because money has no ear-mark; and

(b) Willes' Rep. 400.

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Ex parte
SOLOMONS.

therefore that the creditor, to whom it belonged, could only come in under the commission with the other creditors. The case of *Ex parte Sayers* (a) may, at the first glance, appear to be against the principle we are now contending for; but notwithstanding the property had, in that case, got confounded with the mass of the bankrupt's property, and had been converted into bills; yet these bills, being capable of being identified at the time of the bankruptcy, were allowed to be specifically claimed. In the present case, there is no such power of identification. And therefore, if bankruptcy had not intervened, an action, not of trover, but of assumpsit, must have been resorted to, to recover the amount of these notes.

Mr. *Bethell*, and Mr. *Paynter*, who appeared for the petitioner, were not called upon to address the Court.

ERSKINE, C. J.—In this case, I have only to express the same opinion, as that which I expressed yesterday in the case of *Ex parte Cunningham*; for I cannot see any distinction in principle between the two cases. If the money in this case had actually got into the bankrupt's possession, the distinction drawn might have been entitled to some weight. But in both these cases the simple question is, whether when a party,—and more especially one who is a mere agent,—admits a sum of money to have been deposited in his hands, for the sole purpose of transmission to a particular person, and he still retains the possession of it,—the depositor has not a right to countermand the trans-

(b) 5 Ves. 172, 3.

mission, and retake his deposit. It is said, that the petitioner might be entitled to recover this money from *Blyth*, but that he cannot do so from the assignees, as they have not possessed themselves of it. But it is manifest, for the reasons given in the preceding case, that the assignees have so dealt with it, as to have made it theirs by adoption; otherwise it would be unjust, I admit, to call on them to repay it. *Blyth* had indeed a right of set-off against the assignees, but he cannot make use of this money for such a purpose, his authority having been countermanded by the party who entrusted him with it; for *Blyth* may be regarded as the mere agent of the depositor, as well as of the bankrupt. In point of law, I am therefore of opinion, that this money must be repaid to the petitioner *Solomons*; and, that justice and equity, on the present occasion, go hand in hand with the law, I think no person can have one moment's doubt.

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SOLOMONS.

Sir J. Cross.—The assignees have certainly adopted the money of the petitioner, as that of the bankrupt's, in their mode of dealing with it, in regard to the lien claimed by *Blyth*. They are therefore responsible for it. Behind the back of the petitioner, they make an arrangement with *Blyth*, that he shall keep the petitioner's money, and pay over other monies to them, the assignees. And now they come into this Court and say, we have not the money, it is in the hands of *Blyth*; go and seek his representatives. Then, after all the previous discussions of the last case, a new point in this is started by the assignees, namely, that the petitioner here has not identified the notes; and it is argued, that if an action of trover had been brought for

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SOLOMONS.

the notes, it must have failed for want of identification. But could not the petitioner have brought an action for money had and received?—a form of action adopted by the Courts of Common Law, on the principles of the Courts of Equity. If the money had passed out of *Blyth's* hands, before the petitioner countermanded the transmission of it, the right of the petitioner to reclaim it might have admitted of some doubt. But it is proved to have remained in his hands at the time of such countermand; and I have therefore no hesitation in saying, that it ought, *ex æquo et bono*, to be restored to its rightful owner, the petitioner.

Sir G. ROSE.—I think this petition is clearly sustainable, both on principles of law and equity. If an action of trover for these notes had been brought against *Blyth* by the petitioner, can there be a doubt but that the refusal to re-deliver them would have been evidence of a conversion? Or suppose a bill had been filed against him, to restrain him from parting with the notes, can it be doubted that an injunction would have been granted? When the first petition of *Ex parte Cunningham* was presented, the act of bankruptcy was taken to have been committed by *Maberly* on the 2d January; and as the relation of principal and agent between *Maberly* and *Blyth* was consequently determined from that time, *Blyth* could, of course, do no further act as agent, and therefore could not, as in that character, pay over the money. It is now contended, that the act of bankruptcy was not committed until the 26th January. But, in the petition now before the Court, nothing turns upon the time when the act of bankruptcy was committed. *Maberly* stops payment

on the 2d January, the intelligence of this fact reaches Edinburgh on the 4th January; and just before the news arrives, the petitioner delivers to *Blyth* 185*l.* in notes, to be remitted by him to London. If these notes had been actually remitted by him to *Maberly*, previous to any countermand by the petitioner, then I agree that the money could not have been recovered from *Maberly's* assignees; but the petitioner would have been obliged to prove his debt under the fiat. But how stands the fact? Before the post leaves Edinburgh on the 4th January, the petitioner gives a notice of countermand. This, therefore, operates as a species of stoppage *in transitu*; for notes in this respect are not different from other chattels; and the owner has a right to stop them before their actual transmission. But the circumstances of this case are still stronger in favour of the petitioner. *Blyth* accepts the notice of countermand; he acts in obedience to it, and retains the notes in his hands; and, by so retaining them, they continue subject to the equities which originally attached to them. Proceedings are instituted against *Blyth* by the petitioner in the Scotch Courts; and if the assignees had not intervened, I think we may presume that the petitioner would have recovered these notes. But the assignees put in a claim, not to these notes specifically, but to all the property in *Blyth's* hands, as the agent of *Maberly*. And the result of the proceedings in the Court in Scotland is, that the assignees take all the property in the hands of *Blyth*, as the agent of *Maberly*, including these notes, or their equivalent; and that any question of preference was to be determined under the proceedings in bankruptcy in England. The whole of this property,

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then, is to be administered by the assignees, subject to the claim of the petitioner; which, in whatever way we view it, is sustainable, both in law and equity. They would have been liable in trover, on the ground of a conversion of the property, by dealing with it under the order of the Court of Session; and in equity, or bankruptcy, they are equally accountable for its value; for by the effect of their arrangement with *Blyth*, the estate of the bankrupt is benefited to the amount of these notes, which the assignees permitted him to retain under his claim of set-off. They have, therefore, taken upon themselves a trust, which they cannot now reject; nor can they shelter themselves under the pretext, that the notes in question, by reason of their compromise with *Blyth*, have never come to their hands.

The like Order was made in this case, as in that of *Ex parte Cunningham*; for which see *ante*, p. 70. (a)

(a) See also *Ex parte Belcher*, *post*, p. 87.

Ex parte ROBERT WYLIE.—In the matter of JOHN MABERLY.

Westminster,
June 5.

The same Order made as in *Ex parte Cunningham*, p. 58. The notes in this case were paid in by the customer on the 3rd January, to a sub-agent of the banker, at Glasgow, who remitted them on the 4th to the banker's managing agent at Edinburgh,

THIS was another petition in the same bankruptcy, presented under the like circumstances, as in *Ex parte Cunningham* (b). The only variation in the facts was, that a sum of 202*l.* 3*s.*, in notes and cash, was on the 3rd January 1832 delivered by the petitioner to the bankrupt's agent at Glasgow, for the purpose of being

(b) *Ante*, p. 58.

remitted to London, in order to retire an acceptance of the petitioner of the same amount, which was payable at the bankrupt's banking-house in London; and that on the following day the Glasgow agent transmitted the notes in a parcel by the mail to *Blyth*, at Edinburgh. In this case also, as in *Ex parte Solomons*, there was no express identification of the notes(a).

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WYLLIE.

Mr. *Bethell* appeared for the petitioner.

Mr. *Sranston*, and Mr. *Montagu*, for the assignees, contended, as in the last case, that as the notes were not identified, the petitioner could only prove under the fiat, or maintain an action against the bankrupt's agent for the amount of the notes; they also contended, as before, that there was no evidence that the notes in question ever reached the hands of the assignees.

ERSKINE, C. J.—It is admitted by the assignees, in the proceedings in the Scotch Court, that the notes were then in the hands of *Blyth*, the bankrupt's agent at Edinburgh; and the case is really very like that which Mr. Justice *Grose* once animadverted upon, of one man trying to pay his own debt with the money of another. The specified purpose, for which these notes were delivered by the petitioner to the bankrupt's

(a) There was another case of *Ex parte Davidson*, precisely similar in its circumstances. The petitioner, on the 4th January 1832, paid into one of the bankrupt's branch banks at Dundee the sum of 108*l.* 8*s.* 9*d.* in Scotch bank notes, and another sum of 72*l.* 6*s.* 6*d.* in Bank of England notes, which were on the following day sent by the Dundee agent to *Blyth* at Edinburgh.

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WYLIE.

agent at Glasgow, was not attained, and could not be attained, on account of *Maberly's* bankruptcy. There is no question but that the assignees exercised a dominion over these notes, and dealt with them as the property of the bankrupt; and that justice, as well as law, requires that the money, if they have not the notes in their possession, should be paid by the assignees.

Sir J. Cross.—The assignees stopped this money in the hands of *Blyth* from being paid over to the petitioner; and they do not deny, that they have either got it, or received value for it. They claimed it as their own in the Court of Session in Scotland, and they do not state what has become of it. The plea now urged by the assignees, of there being no identification of these notes, is unworthy of respectable men, after the claim which they insisted upon in the Court of Session. There is no difference between this and the former cases. The assignees, in settling an account with *Blyth*, allowed him to retain these very notes, for which they had credit given to them in the account. This, therefore, is substantially the same, as if they had received the money. I must beg to observe, that as no question of law or equity has been argued before us on the present occasion, there can be no pretence in this case for any right of appeal; and I wish it to be understood, in future, that when any case is proposed to be sent from this Court to another tribunal, by way of appeal, I, for one, shall expect that some point of law, or equity, shall be specified, which was urged before us in the argument of the case (*a*).

(*a*) By the third section of the Bankruptcy Court Act, 1 & 2 Will. 4. c. 56., it is declared that the matters heard and determined in the Court of

Sir G. ROSE.—The only point for us to consider on the present occasion is, whether this case differs materially in its circumstances from those we have already decided; for I have heard nothing in the shape of argument, that induces me to think that those cases have not been determined according to principles of equity. When the first case came before us, the point was raised on the act of bankruptcy, as being committed on the 2d of January. It is stated now, that it was not committed before the 26th of January.

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Review shall be “ subject to an appeal to the Lord Chancellor on matters of law and equity, or on the refusal or admission of evidence, *only*; and in all cases of appeal to the Lord Chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall, in any case, otherwise direct; which special case shall be approved and certified by one of the judges of the said Court of Review.” In the report of *Ex parte Cunningham*, in 1 Mont. & B. 284, Mr. Montagu contended in argument, that the latter part of this clause of the statute merely prescribes the *mode*, in which the right of appeal shall be enforced, and does not extend to give a power to the Court to refuse to certify that the case is a proper subject of appeal. And he adds, that when the special case in this matter was afterwards argued before the Lord Chancellor, his Lordship said, “ I perceive, that the judges of the Court of Review thought they might exercise a discretion as to the suitor’s right to appeal. This appears to me to be erroneous. They have no such right.” Now, with all due respect for this decision, it is difficult to understand,—when a statute confines the right of appeal to “ matters of law and equity, &c.” and directs that the special case (which it prescribes as the form of the appeal) “ shall be *approved* and certified by one of the judges,”—why the judge may not exercise a *discretion* in deciding, whether the question is, or is not, a matter of law or equity, and why he may not refuse to certify, if he thinks it is not a matter of law or equity. *Approbation*, one would imagine, *ex vi termini*, implies some sort of *discretion* to be exercised by the person who is authorized to *approve*—some sort of capacity to agree, or disagree—some power of acceptance, or rejection. And it would be perfectly nugatory in the statute, first to limit the suitor’s right of appeal to certain matters, and then direct the special case to be submitted to a judge for his *approbation*, if the judge had no power to *disapprove* of the statement in the case,—or to decide, upon his own responsibility, that the case itself was not a proper subject of appeal.

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But, as I observed before in *Ex parte Solomons*, I do not think any thing turns upon that fact. The simple question on this petition is, whether these notes ever passed to the assignees. It appears, that they were delivered to *one* agent of *Maberly's* at *Glasgow*, and were transmitted by him to *another* agent at *Edinburgh*; and that the interdict obtained in the Scotch Court specifies these very notes as being in the hands of *Blyth*, the *Edinburgh* agent, and directs them to be handed over to the assignees. We must take it, therefore, that the notes have reached the hands of the assignees; and they are bound to deliver them up, or pay over the amount to the petitioner.

The like Order was made as in *Ex parte Cunningham*, for which see *ante*, p. 70. (a)

(a) There was another case of *Ex parte Brown*, in which the Court came to a like decision. The only difference in the facts of that case was, that the petitioner, in exchange for the notes paid by him into the branch bank at *Glasgow*, received from the agent there a *cheque* on the branch bank at *Edinburgh*; but the Court thought that the *cheque*, given under these circumstances, was nothing but waste paper, and did not vary the rights of the petitioner. In another case of *Ex parte Watson*, it was alleged by the counsel for the assignees, that the parcel containing the notes was, on its way from *Glasgow* to *Edinburgh*, stolen by a clerk of *Blyth* before it reached its destination, and that these notes therefore could never have come to the possession of the assignees. The Chief Judge was disposed to think that this circumstance might make a distinction in the case; but, as the assignees were not furnished with satisfactory proof that the notes paid in by the petitioner at *Glasgow* were in the identical parcel that was stolen, the case was ordered to stand over, to enable the assignees to adduce evidence of that fact. No further evidence, however, was ever produced; and therefore the same order was made as in the former cases.

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Ex parte A. B. BELCHER and others.—In the matter
of JOHN MABERLY.

Lincol. Inn Hall,
July 22 and 23,
and Aug. 15,
Cor. Lord
Chancellor.

THIS was an appeal by the assignees of the bankrupt from the decision of the Court of Review in the case of *Ex parte Cunningham* (a). The special case stated precisely the same facts as are contained in the former report of that case. The question for the decision of the Lord Chancellor was, whether Messrs. *Cunningham* and *Hunter*, the petitioners in the former case, were entitled to recover from the assignees, or the estate of the bankrupt, the sum of 305*l.* 15*s.* which was the subject of the former Order.

The Order made in *Ex parte Cunningham*, (see p. 58,) confirmed on appeal to the Lord Chancellor.

On an appeal in bankruptcy, the appellant's counsel are entitled to open the case.

Mr. *Knight*, who appeared as the leading counsel for the respondents, contended that he was entitled to open the appeal; as the present respondents, *Cunningham* and *Hunter*, were the original petitioners.

Lord BROUGHAM, C.—Whatever may be the practice in other cases, it is the constant practice in bankruptcy for the appellant to begin; the same course was adopted in *Ex parte Moulton* (b).

Sir Edward Sugden, Mr. Swanston, and Mr. Montagu, appeared in support of the appeal. The questions raised on this appeal are,—1st. Did the assignees ever receive the notes paid to *Blyth* by *Cunningham* and *Hunter*? 2d. If the assignees did receive these

(a) See ante, p. 58.

(b) 2 Dea. & C. 419.

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BELCHER
and others.

notes, have *Cunningham* and *Hunter* a right to recover the amount? The second question depends, of course, upon the affirmative of the first.

With respect to the *first* question,—it is the settled law of this Court, that trustees are not chargeable with any money except what they actually receive, or which, but for their wilful default, they might have received. The order of the Court of Review proceeds on the ground, not that the assignees are to be charged with money they have not received, and which but for their wilful default they might have received,—but that the assignees have actually received, in legal construction, the sum in question. Now we contend that the assignees have, neither actually, nor by legal construction, received one farthing of this money. On the 4th of January 1832, when this money was paid in to *Blyth* at Edinburgh, and when he received notice that *Maberly* had stopped payment,—which notice was not received till three o'clock in the afternoon of that day, *Blyth* was, at that moment, a creditor of *Maberly* for 499*l.* 5*s.* 6*d.*, after giving credit to *Maberly* for this sum of 305*l.* 15*s.* so paid in by *Cunningham* and *Hunter*. Subsequently to the 4th of January, *Blyth* received from different agents of the bankrupt in Scotland, the sum of 2877*l.* 0*s.* 7*d.*; against which sum he claimed a right to set off the balance due to him of 499*l.* 5*s.* 6*d.* In consequence, however, of the order of the Court of Session, an account was settled between the assignees and *Blyth*; and the result was, that the assignees admitted they could not prevent *Blyth* from setting off the 305*l.* 15*s.*; and *Blyth* admitted, that he could not set off the 499*l.* 5*s.* 6*d.* from the 2177*l.* 0*s.* 7*d.*; which last-mentioned sum *Blyth* therefore paid the as-

signees accordingly. (a) Whatever may be the demand, then, which either *Cunningham* and *Hunter*, or the assignees of *Maberly*, may have against *Blyth*, it cannot be said, that the assignees have received this sum of 305*l.* 15*s.*, or any part of it.

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But supposing the Court should be of opinion, that the assignees have received these notes, have *Cunningham* and *Hunter* a right to recover the amount? This will depend upon their right to receive it from *Blyth*; and their claim against *Blyth* is founded on the erroneous supposition, either that payments made to an agent, before notice that his principal has stopped payment, are voidable,—or that this sum of 305*l.* 15*s.* must be considered in the nature of a short bill, although it was expressly paid to *Blyth* in consideration of an undertaking that *Maberly* should pay, not the specific notes, but the amount of them, in London. Now can it be contended, that any payment to an agent is voidable, which is made before notice of the stoppage of his principal? In the present instance, business to a great extent in Edinburgh was transacted by *Blyth*, between the 2d of January, when *Maberly* stopped payment,—and three o'clock on the 4th, when he had notice of the fact. Are

(a) The state of the final account, as settled between *Blyth* and the assignees, was as follows:—

				<i>James Blyth,</i>			
Dr.	£.	s.	d.	Cr.	£.	s.	d.
Received before <i>Maberly</i> stopped payment	3619	11	6	Cash	3619	11	6
Do. after stoppage, but before notice..	305	15	0	Do.	305	15	0
Do. after notice	2877	0	7	Paid	2106	19	6
				Do.	499	5	6
				Costs	93	15	6
				Stamps, &c.	177	0	1
	<u>6802</u>	<u>7</u>	<u>1</u>		<u>6802</u>	<u>7</u>	<u>1</u>

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the payments made by him in this interval to be held valid, and the receipts considered void, although the very payments made by him may have been wholly out of those receipts? But the question, whether *Cunningham* and *Hunter* could recover the amount of these notes from *Blyth*, was never raised before the Court of Review, as he was not before that Court to protect his own interests; and, for the same reason, it is submitted that the question cannot be gone into on the present occasion.

It has been said, however, that the account between *Blyth* and *Maberly's* assignees was settled behind the backs of *Cunningham* and *Hunter*, and that their interests have been injured by it. But they had no right to interfere with the assignees obtaining from *Blyth* the balance legally due from him to *Maberly's* estate; nor could any settlement of account between the assignees and *Blyth* affect any claim against him by *Cunningham* and *Hunter*. Suppose *Cunningham* and *Hunter* brought an action against him to recover the amount of these notes, could he plead in bar to the action that he had settled the account between him and the assignees,—that the amount of the notes paid to him by the plaintiff in the action formed an item in that account,—and that he had paid over the balance to the assignees? How can the admission of the assignees of *Blyth's* right of lien against them prejudice the rights of third persons, against whom *Blyth* has no lien whatever? And, indeed, the order of the Court of Session has been framed with such caution, that it does not decide any thing which can in the remotest degree affect the rights of Messrs. *Cunningham* and *Hunter*, or those indeed of any other parties than *Blyth* and the assignees.

But independently of these objections to the order, it

seems also very doubtful, whether the Court of Review had jurisdiction to make it. It will be observed, that the order is not for a return of the specific notes, but for the payment of the sum of 305*l.* 15*s.*; which is beyond the jurisdiction exercised by the Court in the case of short bills.

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But, as we say, the notes delivered by *Cunningham* and *Hunter* to *Blyth* have never reached the hands of the assignees; and as there is nothing in the dealings between *Blyth* and the assignees, to entitle *Cunningham* and Co. to claim the amount from the assignees, we submit, that the decision of the Court of Review in this matter is erroneous, and that Messrs. *Cunningham* and *Hunter* can only prove under the fiat, with the bankrupt's other creditors.

Mr. *Knight*, Mr. *Bethell*, and Mr. *Paynter*, appeared for the respondents. In regard to the objection made to the jurisdiction of the Court of Review, because the order calls upon the assignees to pay the amount of the notes, instead of requiring them to return the specific notes to *Cunningham* and *Hunter*, as in cases of short bills,—we contend, that the Court of Review has ample jurisdiction to make such an order upon assignees; although in the case of a stranger to the fiat, the objection might perhaps hold good.

Then, with respect to the objection that *Blyth* is a necessary party to this proceeding, and ought to have been before the Court,—we say, that *Blyth* being *Maberly's* agent, he and *Maberly* are the same person in legal liability; consequently, it is quite sufficient that *Maberly* is before the Court.

But the merits of the case are involved in these

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simple questions:—1. Would not *Cunningham* and *Hunter* be entitled to recover these notes from *Blyth*, if they had remained in his hands? 2. Have not the assignees, by the arrangement they have made with *Blyth*, taken upon themselves the whole of his liabilities?

First, as to the liability of *Blyth* to return these notes. Where a customer pays in short bills to a country banker, who is in the habit of remitting such bills to a London banker as a security for advances, and the country banker becomes bankrupt; the customer is entitled to claim the amount of the bills, out of such surplus of the proceeds as remain in the hands of the London banker, after satisfying his lien. This was decided by Lord *Lyndhurst* in *Ex parte Armitstead*(a). In the present case, however, the notes were deposited with *Blyth* by *Cunningham* and *Hunter*, in utter ignorance of the stoppage of *Maberly*, upon a contract which had wholly failed at the time of the deposit; the contract being, that *Blyth*, as the agent of *Maberly*, should remit the amount to *Maberly's* bank in London. But in consequence of *Maberly's* failure, the existence of *Blyth's* agency ceased with the stoppage of the bank in London; so that the contract, which was made for a particular purpose, failed from the very beginning; for *Blyth* was no longer an agent authorized to receive, or to remit. The case of *Ex parte M'Gae*(b), shows what is the established law on this subject, namely, that a contract made in ignorance of a fact, which is the foundation of the contract, is not permitted to stand. In that case, bills of exchange were paid into a bank of four

(a) 2 G. & J. 371.

(b) 2 Rose, 376; 19 Ves. 607.

partners, after the bankruptcy of three of them, but before the bankruptcy of the fourth; and it was held, that the assignee, under a commission against the four partners, was not entitled to retain the bills. The same reason, which Lord *Eldon* gave for his decision in that case, applies with equal force to this; the consideration failed, upon which alone the bills were parted with. If *Blyth*, when he received these notes, had known of *Maberly's* failure, he would have been guilty of a gross fraud; for he would have received them under the false pretence of remitting them to a solvent bank in London, which he previously knew had stopped payment; and in such case the contract would have been void, on the ground of fraud. *Gladstone v. Hadwen*(a), *Read v. Hutchinson*(b), *Toovey v. Milne*(c). But, in this case, the deposit was recalled the very moment the stoppage was known. The property, therefore, never passed to *Blyth*, or *Maberly*; nor could *Blyth* acquire any lien on the notes, by a wrongful detention of them from their lawful owners. *Buchanan v. Findlay*(d).

It has been contended by the other side, that the transactions on the morning of the 4th January, before *Blyth* received notice of *Maberly's* failure, were all valid; and that there is no difference, in this respect, between his payments and receipts. But there is a fallacy in this argument. It is the equity of the payee alone, that would render such payments good. For if a man pays money to a bankrupt, of whose bankruptcy he is ignorant, that money cannot be retained; as it was fraudulent in the bankrupt to receive it(e). In

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(a) 1 M. & S. 517.

(b) 3 Camp. 352.

(c) 2 B. & Ald. 682.

(d) 9 B. & C. 738.

(e) This position is too general, and requires some qualification. It is only where money is paid (or rather *delivered*) upon a trust to a bankrupt,

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Bislonka
and others.

this case, however, we say that the agency of *Blyth* had wholly ceased from the 2d January,—the day when *Maberly* wrote to him to discontinue the business,—notwithstanding the letter was not received by *Blyth* until the afternoon of the 4th January. In *Satts v. Feild* (a), where a vendee of goods, by a letter to his agent, dated before the delivery of the goods, but not received by the agent until after the delivery, countermanded the purchase, stating that he was ruined in consequence of several failures,—and the vendor, upon the letter being shown to him, said that he was willing to take back the goods,—it was held, that the contract was rescinded from the date of the letter, that the goods were consequently revested in the vendor, and that the assignees of the vendee (who had become bankrupt) were not entitled to retain them. And the same principle was acted upon in the case of *Richardson v. Goss* (b). It is clear therefore that *Blyth's* authority, as *Maberly's* agent, to continue the business of the bank at Edinburgh, had been revoked two days before he received these notes of *Cunningham* and *Hunter*; and that they, having paid them to him under the mistaken notion that he still continued to be such agent, have a right to recover them back. Immediately they hear of *Maberly's* failure, and whilst the notes were still in *Blyth's* possession, they give him notice not to part with them, and obtain an interdict for that purpose from the Scotch Court; and a short

by a party who is ignorant of the bankruptcy, that the money can be recovered back. The payment of a debt to the bankrupt, under these circumstances, would be good, under the provisions of the eighty-second section of the Bankrupt Act.

(a) 5 Term Rep. 211.

(b) 3 Bos. & Pul. 119.

time afterwards, whilst *Blyth* retains the actual possession of the notes, the fiat issues against *Maberly*. There can be no doubt, therefore, that *Cunningham* and *Hunter* were entitled to recover these notes out of the hands of *Blyth*.

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Then, let us consider the effect of the arrangement between *Blyth* and the assignees. In the suit instituted by the assignees against *Blyth* in Scotland, the Court of Session ordered that he should pay to the assignees "the whole bank notes and other monies and effects in his hands, as agent for *J. Maberly*, after deducting in the meantime the sum of 4424*l.* 12*s.*, for which he claims a right of retention; and reserved to all parties their respective rights and claims of preference, to be insisted on in due form of proceeding in England." Now, after deducting this sum from the funds in his hands, the balance which the assignees would be entitled to receive, under this order, was 2377*l.* 15*s.* 1*d.* But by an arrangement made between them and *Blyth*, he pays to the assignees 2697*l.* 0*s.* 7*d.*; whereas, if the order of the Court of Session had been followed, they would only have received 2377*l.* 15*s.* 1*d.*; so that the assignees, by this arrangement, obtain from *Blyth* 319*l.* 5*s.* 6*d.* more than they were entitled to, under the order of the Court of Session. They now stand, therefore, completely in *Blyth's* shoes, and have made themselves responsible for the whole of his liabilities. Messrs. *Cunningham* and *Hunter* were referred by the order of the Scotch Court to the Court of Bankruptcy in England, on the ground that their rights and claims would be here most properly discussed and determined; and therefore it would be absurd to maintain, that they must now go back again to Scotland, and

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sue *Blyth*, when they have an equal claim here against the assignees. In conclusion, we submit, that the legal effect of the arrangement which the assignees have come to with *Blyth*, is to make his debt their own; and that Messrs. *Cunningham* and *Hunter*, having been no parties to this arrangement, are entitled to recover from the assignees the 305*l.* 15*s.*, which the latter permitted *Blyth* to set off against the balance due from him to *Maberly's* estate.

Sir *Edward Sugden*, in reply. The argument of the other side proceeds upon a misconstruction of the order of the Court of Session; they assume, that the assignees have received this sum of 305*l.* 15*s.* from the hands of *Blyth*, because the order of the Scotch Court, as it is contended, directed *Blyth* to pay over that sum to the assignees. But the order did no such thing; it merely directed *Blyth* to deliver to the assignees the whole of the funds in his hands, after deducting the 4424*l.* 12*s.*, for which he claimed a right of retention. He was entitled to retain the sum of 3925*l.* 6*s.* 6*d.*, which included the notes and cash delivered by *Cunningham* and *Hunter*; and he also claimed a right to retain the further sum of 499*l.* out of the 2876*l.* 16*s.* 3*d.* received by him subsequent to the 4th January; but this claim he afterwards abandoned, and paid over the whole of the 2876*l.* 16*s.* 3*d.* to the assignees. So that there is no doubt, that the 305*l.* 15*s.* was never paid by him to the assignees. But what have the assignees done, since the order of the Court of Session, to prejudice any right of *Cunningham* and *Hunter* against *Blyth*? It does not appear, that the notes and cash paid in by them have ever left his hands. He retained the whole, as he was authorized

to do by the order of the Court of Session. But, though entitled to retain the amount as agent to the assignees, the order has not determined that he has a right to do so, as against *Cunningham* and *Hunter*. That question still remains open. It is very probable, that they may have a right to recover from *Blyth*; and if so, then *Blyth* will have a right to prove for the amount against *Maberly's* estate. But the claim of *Cunningham* and *Hunter* is not affected by any arrangement the assignees have made with *Blyth*; for *Cunningham* and *Hunter* cannot be bound by any act to which they were no parties. It is not pretended, that the 305*l.* 15*s.* formed part of the 2876*l.* 16*s.* 3*d.* received by the assignees; and unless it did, what claim can *Cunningham* and *Hunter* set up against the assignees?

But supposing that this money has actually reached the hands of the assignees, then what is there in this case to entitle *Cunningham* and *Hunter* to a preference over *Maberly's* other creditors? The Court of Review seems to have forgotten, that where a banker becomes bankrupt, his customer, who pays in money in the regular course of business before the fiat issues, cannot recover the amount of the assignees, hard as the case may be upon the customer; but that he is only entitled to a dividend *pro rata* with the rest of the bankrupt's creditors. Unless these notes were clothed with a specific trust, there is nothing to distinguish this from any ordinary case of paying money into a banker's just previous to his failure; which money becomes immediately a *debt* from the banker, and can only, like other debts, be proved under the fiat. And it makes no difference, although the assignees, in this case, had received the

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money paid in by *Cunningham* and *Hunter*; for even then they would have only a personal right against the assignees, and no right whatever to claim the 305*l.* 15*s.* out of the bankrupt's estate. But it is said, that these notes were paid in for the special purpose of being transmitted to the banking-house in London. Now, it could not be expected that these identical notes were to be so transmitted; for this was known not to have been the course of business. The mode of transmission was by the order which *Blyth* gave upon the London bank. There could be no use in remitting Scotch notes to London, nor was that the usual mode in which the business was transacted.

With respect to the case of *Ex parte Armistead* (a), which has been cited by the other side, it is altogether inapplicable to the circumstances of this. In that case a country banker, who had become bankrupt, remitted short bills of his customer to a London banking-house, for the purpose of procuring advances upon them; and it was held, that the customer was entitled to be indemnified from such surplus of the securities, as should remain after satisfying the lien of the London house. But here there was no surplus of that kind; on the contrary, *Blyth* was indebted to *Maberly* in a large balance,—no less than the sum of 2800*l.*

The case of *Ex parte M'Gae* (b), also, is by no means parallel with this; for there the bills were paid in after the bankruptcy of some of the partners, and the assignees were therefore compelled to give them up. But here there was not only no bankruptcy at the time these notes were paid into the bank at Edinburgh, but not even any notice that *Maberly* had

(a) 2 G. & J. 271.

(b) 19 Ves. 607; 2 Rose, 376.

suspended his payments. It was an open public dealing, in the usual course of business, between *Cunningham* and *Blyth*; and there is nothing to invalidate the acts of *Blyth*, before he received notice of *Maberly's* failure.

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The other cases cited were cases of fraud and deceit, and there is no imputation of the kind here, in regard to the conduct either of *Maberly*, or *Blyth*. In *Gladstone v. Hadwen* (a), the bankrupt had obtained from the defendant bills of exchange upon a fraudulent representation, and on the next day, having resolved to stop payment, told the defendant that he repented of what he had done and would return the bills,—though he did not in fact return them until after he had committed an act of bankruptcy; and it was held, that the defendant was entitled to retain them. The bankrupt there had done what was morally wrong; and he engaged to do what was morally right, before he committed an act of bankruptcy; though he could not complete his engagement until afterwards. So *Read v. Hutchinson* (b), was entirely a case of fraud. A party had bought goods to be paid for by a bill drawn by *E.* upon *P.*, without recourse to the buyer, in case of its not being paid, knowing at the time that the bill was worth nothing; and Lord *Ellenborough* held, that he was not liable for the value of the goods in an action of indebitatus assumpsit, being not a purchaser of the goods, but a person who had tortiously got possession of them; and that the proper remedy was trover, or an action of deceit. In *Buchanan v. Finlay* (c), *A. & Co.*, merchants at Liverpool, remitted a bill to *B. & Co.* in London, with directions to get it

(a) 1 M. & S. 517. (b) 3 Camp. 352. (c) 9 B. & C. 738.

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discounted and apply the proceeds in a particular way; *B. & Co.* not having complied with these directions, *A. & Co.* required them to return the bill, which *B. & Co.* declined to do, and received the amount when it became due, and after a commission of bankrupt had issued against *A. & Co.* Under these circumstances it was held, that *B. & Co.* were liable to be sued for the amount by the assignees of *A. & Co.*, as money received to their use, and that *B. & Co.* could not set off a debt due to them from *A. & Co.* But that was not the case of a payment to a banker in the ordinary course of business. It was just the same as if after sending my servant to receive a check and pay a tradesman's bill, I sent another to stop him before he got to the banker's; in which case he would, of course, be obliged to return me the check, or repay me the amount, if he had disregarded my counter-order. Then, the other case of *Toovey v. Milne* (a), merely decided, that where the friend of a bankrupt had advanced money to him for the express purpose of settling with his creditors,—and the purpose having failed, the bankrupt repaid his friend a part of the money,—the assignees could not recover the money which had been so repaid. But none of these cases apply to the present question. They merely establish the right of a party to recover property of which he has been defrauded, or which he has entrusted to another for a particular purpose, where the purpose has altogether failed. The payment in this case to *Blyth*, the agent of *Maberly*, was a payment to *Maberly* himself; and there can be no doubt, that money so paid into a banker's by a customer in the usual

(a) 2 B. & A. 683.

course of business is mixed with the banker's general effects, and passes to the assignees.

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Cur. adv. vult.

LORD BROUGHAM, C.—I think there is more in this case than there appeared to be to the judges in the Court of Review. But it is more a question of fact, than of law; and, upon the whole, I agree with them, and dismiss the appeal, but without costs (*a*).

August 15.

(*a*) The Reporters not having been present in Court, when this judgment was pronounced, are indebted to their learned competitors, Messrs. *Montagu* and *Bligh*, for this summary account of it (*b*). But they cannot help suspecting,—to use the language of the Lord Chancellor,—that there must have been more in the judgment, than appears in this report. If his lordship thought that this appeal involved “more a question of *fact*, than of *law*,” it seems rather extraordinary that the appeal should not, on this ground alone, have been dismissed *with costs*; a decision which would have been more consistent with the provisions of the 3d section of the 1 & 2 *W. 4. c. 56.*, which limits the appeal from the Court of Review to “matters of law and equity, or the refusal or admission of evidence, only.” The result proves, however, that the reluctance of the learned judges of the Court of Review, to certify that this case was a proper subject of appeal, was not without more cause to justify it, than his lordship at first supposed.—*Vide ante*, p. 85, *note*, and 1 *Mont. & B. 283. et seq.*

(*b*) See 1 *Mont. & B. 307.*

Ex parte SMITH.—In the matter of SMITH.

Southampton
Buildings,
February 26.

THIS was the petition of the bankrupt to annul the fiat, on the ground that he had not committed an act of bankruptcy. It appeared, that one of his creditors had issued an execution against him, under which he

When the bankrupt petitions to annul the fiat, on the ground that he has not committed an act of bankruptcy, the

Court will order him to be furnished with copies of the depositions relating to the act of bankruptcy.

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had not only swept away all his goods, but had also seized the lease of his house, and turned the bankrupt out of doors, who was obliged to seek an asylum at a friend's house, two miles off. A servant, however, was left on the premises, who told any creditor that called, where the bankrupt was to be found.

Mr. *Bethell*, in support of the petition, applied to have copies of the depositions relating to the act of bankruptcy. He stated that the petition was presented within two calendar months from the date of the adjudication; so that the bankrupt was entitled to an issue, if he chose to ask it, to try the validity of the adjudication, according to the provisions of the 17th section of the Bankruptcy Court Act.

ESKINE, C. J.—If the respondents had filed any affidavits, in support of the act of bankruptcy on which they relied, the bankrupt would in that case have had notice of what he had to answer. But as they have not done so, and the bankrupt has no knowledge of the contents of the depositions, and is moreover concluded by the terms of the 17th section from disputing his bankruptcy in any other proceeding, I think it is reasonable that he should be furnished with copies of the depositions, and that he should have time to answer them.

ORDERED, that the petition should stand over, and that the petitioner should be furnished with copies of such of the depositions as related to the act of bankruptcy; the petitioner undertaking not to try his bankruptcy by any other proceeding, and to abandon his right to an issue.

1833.

Ex parte ROBINSON.—In the matter of **FAWCETT.**

*Southampton
Buildings,
February 27.*

THIS was the petition of an equitable mortgagee, praying that the assignees might be ordered to sell the estate which was the subject of the mortgage, pursuant to the terms of a former Order, and to pay the costs of this application. It appeared, that the previous Order for the sale of the property was made on the 15th of September 1832, a copy of which had been duly served upon the assignees, and that the petitioner had made repeated applications to them to advertise a sale, without effect. The only reason the assignees gave for the delay was, that they wished the sale should be deferred till the spring, and that the property should be sold in lots; while the petitioner required it to be sold in one.

After an order for sale obtained by an equitable mortgagee, if the assignees delay the sale; *semble*, that the course is not to present a fresh petition for a sale, but to prosecute the former order.

Mr. Bacon appeared in support of the petition.

Sir G. Rose.—You must prosecute the Order already obtained, with liberty for either party to apply, and the question of costs to be reserved.



Ex parte WILLIAMS.—In the matter of **LLEWELLYN.**

*Southampton
Buildings,
February 28.
March 1.*

THIS was the petition of a creditor, charging the Commissioners with various acts of corruption and misconduct, by conniving at the fraudulent proof of some debts, and the improper rejection of others; and alleging, also, that the assignees had been improperly chosen. The petitioner prayed, therefore, that the Commis-

Where unfounded charges of corruption were brought against Commissioners by a petitioner, who appeared to be the tool of other parties, the Court ordered the Commis-

sioners their "costs, charges, and expenses," and suspended the Order until the attorney for the petitioner should show cause why he should not personally pay the costs.

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Ex parte
WILLIAMS.

sioners and assignees might be removed, that new assignees might be chosen, and that certain proofs of debts might be expunged. The affidavits, however, that were filed in support of the petition did not establish the charges contained in it. The petition alleged, that the Commissioners admitted three proofs without examination, and it appeared from the affidavits that they did examine into the validity of each of these debts before they admitted them to be proved. One of them was in respect of a bill of exchange for 40*l.*, with the bankrupt's name upon it, and upon which he had already paid 10*l.* in part; and in each of these cases it appeared by the affidavits that *some* debt was due, though the Commissioners, it was stated, had admitted the proof to too great an extent. It turned out also, that the petitioner himself had not attended the meeting at which he charged the Commissioners with having thus misconducted themselves, but that he took his information from an attorney's clerk who was then present.

Mr. *Roe*, and Mr. *Sharpe*, appeared in support of the petition.

Mr. *Twiss* for the Commissioners.

Mr. *Swanston*, and Mr. *J. Russell*, for the assignees.

Mr. *Lovat* for the creditors.

ERSKINE, C. J.—The petitioner in this case does not charge the Commissioners with having made merely a mistake in the admission of the proofs, but with

wilful corruption. It is a charge, which ought not to have been rashly made; or if so, it ought, at any rate, to have been withdrawn, immediately it was discovered there was no foundation for it. I was anxious, therefore, to hear every thing that could be said in its justification, and I do not find so much as an excuse; for the evidence, that has been adduced in support of it, does not go even so far as to establish an error of judgment in the Commissioners. It appears to me, that they could do no less than admit the proofs, to which objection has been made. The Court, too, cannot but observe on the mode in which this petition has been got up. The petition is signed with the mark of the petitioner, who is evidently an illiterate man, and made the tool of others on this occasion; and there is little doubt, from the tenor of the affidavit which the bankrupt has made in support of this petition, that *he* is the principal mover of it. I am sorry, that we cannot do more, on this occasion, than make the petitioner pay the costs.

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Ex parte
WILLIAMS.

Sir J. CROSS.—Upon the statement of an attorney's clerk, and not from the petitioner's own personal knowledge,—for he himself was absent from the meeting in question,—this petitioner has ventured to charge the Commissioners with corruption, injustice, and dishonourable conduct. He has accused the Commissioners with having violated their sacred oath, to execute the commission without favour or affection. I am bound to say, after hearing the evidence, that the charge is false and scandalous; and I regret, that we can only award the Commissioners the fullest measure of compensation which this Court has the power to direct.

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Ex parte
WILLIAMS.

Sir G. ROSE.—It would be impossible to sustain a petition of this kind, containing such serious charges against the Commissioners, upon less evidence than that which would sustain an indictment for a conspiracy. I entirely concur with the rest of the Court, that there is not the slightest foundation for the charges foisted into this petition. I would suggest, therefore, that the petitioner should be ordered to pay the Commissioners their costs, charges, and expenses, and to the respondent parties their common costs; but that the Order should be suspended, until the attorney for the petitioner, after due notice served upon him, shall have been heard to show cause why he should not personally pay the costs.

So ordered accordingly.

Southampton
Buildings,
March 1.

Ex parte CARTER.—In the matter of **DOWN.**

An auxiliary fiat granted to examine witnesses in London, the original fiat being worked at Portsmouth.

THIS was a petition of the petitioning creditor for an auxiliary fiat, for the examination of witnesses, under the 20th section of the Bankrupt Act. It appeared, that the petitioning creditor lived at Portsmouth, where the fiat was directed, and where the bankrupt had carried on his business, but that many witnesses resided in London, who could speak to the circumstances under which various debts were contracted by the bankrupt. There were no assignees yet chosen under the fiat; the Commissioners having adjourned the choice to the 13th March, to enable those creditors, whose debts were sought to be inquired into, to vote in the choice.

Mr *Montagu* appeared in support of the petition.

1833.

Ex parte
CARTER.

The COURT made the order as prayed, confining it to witnesses in London, so as not to interfere with the execution of the fiat at Portsmouth; and directed that all the creditors, whose debts were to be the subject of inquiry, should be served with the order, and that the petitioner should pay the costs of these proceedings.



Ex parte HEHIR.—In the matter of HEHIR.

Southampton
Buildings,
March 1.

THIS was the petition of the bankrupt to supersede the fiat, on the ground of his minority, and praying also that the bond of the petitioning creditor might be assigned to him. It appeared, that the fiat was issued against the bankrupt nine months before he would come of age, and that when the dealings began between the petitioning creditor and the bankrupt, the latter was only 18 years old, of which the petitioning creditor had full notice; but that he nevertheless continued to sell him goods, and imprisoned him for the debt before he issued the fiat.

A fiat superseded, with costs to be paid by the petitioning creditor, on the ground of the bankrupt's minority; but the Court made no order for assigning the bond.

Mr. *Swanston* appeared in support of the petition.

ENSKINE, C. J.—This fiat is clearly one that cannot be supported, but it is not a case, I think, to assign the bond. The petitioning creditor, however, must pay the costs of this petition and the supersedeas; that being the ordinary course, where a petitioning creditor takes out a fiat which he cannot support.

1833.

Ex parte
HEHIR.

Sir J. Cross.—It seems to me very questionable, whether this fiat was not maliciously sued out by the petitioning creditor, and whether we ought not accordingly to assign the bond. The creditor has gone on dealing with the bankrupt when he knew he was a minor, and has given full credit where he ought not to have given it, acting injuriously to himself, and his debtor too. He then sues out a fiat against him, and shuts him up in prison, expecting to reap the fruits of these illegal proceedings. I think it therefore rather difficult to say, that this fiat is not maliciously sued out.

Sir G. Rose.—This fiat is decidedly void, and the supersedeas must go, with costs. But the assignment of the bond might prove an inadequate remedy to the bankrupt; and therefore we might do him injustice, by confining the amount of the damages he may recover to the penalty of the bond.

Southampton
Buildings,
March 1.

A creditor tenders a proof for 3500*l.* which the Commissioners reject *in toto*; and, after presenting a petition against their decision, an order is made, by consent, that he shall prove for 500*l.* The Court would not grant him costs out of the estate; but ordered each party to pay his own costs.

Ex parte WATERHOUSE.—In the matter of BIGGS.

THIS was the petition of a creditor to prove a debt for 3500*l.*, which had been rejected by the Commissioners. It also prayed, that the costs might be paid out of the estate. It was agreed between the parties, when the petition came on for hearing, that the petitioner should be permitted to prove for the sum of 500*l.*, and the only question now was as to the costs.

Mr. Swanston, in support of the petition. The reason for asking for costs is, that the Commissioners

rejected this proof *in toto*, through an error in judgment. All the costs we ask are those of this petition, in which the decision of the Commissioners is overruled. It was decided in *Ex parte Fiske* (a), that where a creditor's proof was rejected on a preliminary objection by the Commissioners, who refused to enter into any examination of the proof tendered, the costs of all parties should be paid out of the estate. The distinction in all these cases is this: whether the party was prevented from going into his proof by a preliminary objection, and the Commissioners refuse to admit any evidence whatever as to the amount of the debt. In such case, where the decision of the Commissioners is overruled, he is entitled to costs out of the estate.

1833.

Ex parte
WATERHOUSE.

Mr. *Montagu*, *contrà*. The general rule is, that costs are never given against a decision of the Commissioners, unless an issue is directed by the Court, and the result is against their decision; in which case, the costs of the issue are allowed. The creditor here applied to prove so large a sum as 3,500*l.*, and now he submits to prove for only 500*l.* This shows there was some reason for the rejection of the proof altogether.

Mr. *Swanston*, in reply. If the question of amount had been before the Commissioners, then it is admitted, that the case would have been within the general rule; but here the creditor was not only prevented from proving the amount of the debt he claimed, but even from offering evidence of his right to prove any part of it.

(a), Mont. & M. 93.

1833.

**Ex parte
WATERHOUSE.**

The COURT, however, thought that under all the circumstances each party in this case should pay his own costs (*a*).

(*a*) The true distinction appears to be, that where the Commissioners decide *ex parte*, and have not the opportunity of exercising a *deliberate* judgment on the matter before them, the party is in such case entitled to costs, if their decision is set aside; but that costs are never given, where they come to a *deliberate* judgment, although their decision proves erroneous. *Ex parte Greenway*, Buck. 412. And see 1 Deac. B. L. 852, 4.

**Ex parte JOHN FARLEY and THOMAS DANKS.—In the
matter of RICHARD DELVES.**

*Westminster,
June 6.*

The Court will not depart from the general rule, that the solicitor to the commission shall not be allowed to purchase any part of the bankrupt's property.

THE petitioners in this case were the assignees under the commission, and the following were the facts:— The commission issued in November 1830, and Mr. *John Stone*, the elder, and two other parties, were appointed the solicitors to it. Pursuant to advertisement, the real estate of the bankrupt, situate at Tonbridge Wells, was put up to auction in several lots at *Garrahy's* Coffee-house; and *Thomas Mortimer Cleobury* was declared the purchaser of the particular lot in question, there being also several other *bonâ fide* biddings. It afterwards turned out, that *Cleobury* had purchased for Mr. *Stone*, the solicitor under that commission; and, the assignees making no objection, deeds were prepared conveying the property to him. But, on their application to Mr. *Stone* to execute the deeds and complete the purchase, he objected, on the ground that he had been advised he could not properly become the purchaser, according to the rules of the Court.

The petitioner therefore prayed, that the property

might be put up for re-sale at the price Mr. *Stone* was to have paid, and in the event of its not fetching as much, then that he might be declared the purchaser; and for the usual order as to the costs.

1838.
—
Ex parte
FARLEY
and another.

Affidavits were gone into to show, that the best price had been bid for the property, and that it was, from its locality, more valuable to Mr. *Stone*, than it was likely to become to any other purchaser; and that there was no probability of any higher price being offered, in competition with Mr. *Stone*. They denied, also, that Mr. *Stone* had the least control over the sale.

Mr. *Swanston*, for the assignees.

Mr. *Willcock*, for Mr. *Stone*.

The COURT thought there was great danger in departing from the general rule, that a solicitor to the commission should not be allowed to be the purchaser of the bankrupt's property. The only case, in which this had ever been allowed, was one where the solicitor was mortgagee, and there was another solicitor appointed to the commission, and the proceedings were taken out of his hands. Any departure from this rule on the present occasion would be a strong temptation to violate its principle in future instances, upon the chance of being afterwards allowed to retain the property, when the matter came to be questioned by the Court.

It was ordered, therefore, that there should be a re-sale, according to the prayer of the petition, with the usual direction as to the costs; and

1833.

Ex parte
FARLEY
and another.

that the sale should be conducted by another solicitor, to be appointed by the Register of the Court,—that the present solicitors to the commission should not interfere in such sale, and that Mr. *Stone* should not be at liberty to bid at such sale.

Westminster,
June 1.

On a petition to supersede, by consent of creditors, the official assignee need not sign the petition.

Ex parte PARKER.—In the matter of PARKER.

THIS was a petition to supersede a commission, by the consent of all the creditors. The officer had declined to issue the order, which had been obtained for the supersedeas, because it did not appear that the official assignee had signed the petition.

The COURT, however, thought that neither the signature, nor the consent, of the official assignee was necessary; and therefore directed the supersedeas to issue.

Ex parte THOMAS STANGER LEATHES.—In the matter of NATHANIEL LAIGHT STANGER LEATHES, and THOMAS BRADSHAW.

Westminster,
June 7.

Where freehold title deeds were intended to be deposited with an equitable mortgagee, together with deeds relating to leasehold property, and were, accordingly, specified in the memorandum of deposit, the freehold property was included in the order for sale.

THIS was the petition of an equitable mortgagee, containing the usual prayer for sale. The lien was claimed on both freehold and leasehold property; and the question was, whether the freehold was included in the equitable mortgage. The title deeds of the leasehold property were deposited with a memorandum, as

the freehold property was included in the order for sale.

follows—"Herewith you will receive the deeds of certain houses, ground-rents, as below enumerated,—which I deposit in your hands, as a security for my proportion of any loss which may be sustained in consequence of money to be advanced by either you, or your father, to the firm of *Leathes and Bradshaw*, of *Mincing Lane*, or either of you becoming security to Messrs. *Dixon and Morgan* for the payment of 5000*l.* and upwards, due from the aforesaid firm to them, as follows:—the acceptance due January 31, 500*l.*; February 2, 500*l.*; April 30, 1000*l.*," &c. (amounting to 5703*l.* 9*s.* 11*d.*)

1833.

Ex parte
LEATHES.

"Deeds deposited as follows:—Ground rents and rentals of Bell Court, Princes Place, and Princes Street, Whitechapel. Ground rents and rentals of Glove Lane, Bethnal Green. Rentals of Bonner Street, Bethnal Green. On payment of aforesaid advance, &c. the deeds to be returned.

Thomas Bradshaw.

To *Thomas Leathes.*

Stanger Leathes."

There were freehold houses situate in Bonner Street, Bethnal Green, numbered from 1 to 6. But no title-deeds of any freeholds were actually deposited in the possession of the equitable mortgagee.

The COURT ordered, that if it should appear that there was no leasehold property in Bonner Street, then that the freeholds there should be included in the usual order for sale.

1833.

**Ex parte WILLIAM CHILTON HUMPHREYS.—In the
matter of RICHARD HUMPHREYS.**

*Westminster,
June 7.*

A clerk, though engaged at a weekly salary, is within the meaning of the 48th section of the Bankrupt Act.

IN this case the petitioner entered into an agreement with his father, the bankrupt, to serve him as his clerk and foreman, in consideration of receiving two suits of clothes *per annum*, and a salary of two guineas per week; which were the same wages as were paid the person who previously held the situation. The service commenced in February 1830, and continued down to the date of the fiat. The petitioner had received to the value of 193*l.* 4*s.*, leaving a balance of 58*l.* 6*s.* still due; and he had applied to the Commissioners (acting under the fiat in the country) to be paid the amount of his salary for the last six months, and for leave to prove for the remainder; but the Commissioners declined to make any order.

Mr. *Bagshaw*, for the petitioner, referred to the 6 *Geo.* 4. c. 16. s. 48., which empowers the Commissioners to order payment to the amount of six months wages due to *clerks* and *servants* of bankrupts, and directing a proof for the residue.

Mr. *Anderdon*, for the assignees, cited *Ex parte Neale* (a), *Ex parte Grellier* (b), and *Ex parte Crawford* (c), to show, that a *yearly* hiring of the clerk or servant was necessary, to bring the case within the terms of the section. In this case it amounted to nothing more than a *weekly* hiring; as a week's notice by either

(a) Mont. & M. 194.

(b) Id. 95; and Mont. Rep. 264, on Appeal.

(c) Id. 270.

party to determine it would have been sufficient. The statute never intended to encourage the laches of suffering six months wages to be due, where they were payable weekly. The circumstance, also, of the contract for the two suits of clothes, could not be construed to extend the hiring beyond a weekly one; for they were given as a mere inducement for the clerk to continue in the situation. And even supposing that he had chosen to quit his employment immediately after receiving a suit of clothes, this would not affect the argument in support of the proof; for the master could have recovered back the clothes in an action of trover.

1888.

Ex parte
HUMPHREYS.

The Court, however, thought that the hiring in this case was to be construed a yearly hiring,—it being general, without any time being specified, and the contract for the two suits yearly implying rather a yearly, than a weekly hiring. It was, therefore, a yearly hiring, with a reservation of payment of the wages weekly. The Court, also, could not accede to the necessity of any yearly hiring; there being nothing in the act to restrict it to a hiring for that period. The cases, where *workmen* had been held not within the statute, were decided more upon the distinction in etymology between the terms *servants* and *workmen*. No one could say, that *workmen* in a manufactory could come within the usual denomination of “*servants*.” They were not considered so by the Revenue Acts, inasmuch as no taxes were claimable for workmen in the character of servants. But, upon the general construction of the word “months” in acts of parliament, the Court said, that the statute only entitled the petitioner to wages for six *lunar* months.

1833.

**Ex parte
HUMPHREYS.**

Ordered, that the petitioner be declared entitled to be paid six lunar months' wages, at the rate of two guineas per week, out of the estate, with leave to tender proof for the residue of his debt; the costs of all parties to be paid out of the estate, those of the assignees being paid in priority.

**Ex parte WILLIAM BULL.—In the matter of JOHN
DITCHMAN.**

*Westminster,
June 7.*

The Court will only exercise a summary jurisdiction over an attorney, when he is acting in the character of an officer of the Court, and not in an ordinary case between attorney and client.

THIS was a petition against an attorney, to refund a sum of money which had been paid to him for costs, under the following circumstances.

By indentures of lease and release, dated December 1828, certain premises were mortgaged to the petitioner by the bankrupt, to secure the repayment of 500*l.* and interest at 5 per cent., before December 1830. The money was not paid, so that the estate of the petitioner in the premises became absolute in law. By a second indenture in November 1830, certain other premises were in like manner assigned to the petitioner, to secure a further sum of 500*l.*; which last mortgage also became forfeited by reason of the non-payment of the principal sum secured.

In November 1831, the commission issued against the bankrupt, and the petitioner, together with another person, were chosen assignees.

It appeared, that *A. B.*, a solicitor of this Court, had been the attorney of the petitioner, in preparing the above mortgage securities, and also in suing out and

prosecuting the commission, under which he had also acted in the character of attorney, as well for the bankrupt, as for the assignees.

1833.

Ex parte
BULL.

By an order on a petition presented by the advice of *A. B.*, the petitioner was declared a mortgagee to the amount of 1074*l.* 2*s.* 3*d.*, and the mortgaged premises were directed to be sold by public auction.

The petition then proceeded to state, that the petitioner, before the day of sale, expressed a wish to *A. B.* to be at liberty to bid at the sale for some part of the premises, who informed him, he ought not to bid in person, but that he was at liberty to do so by a friend; and the petitioner, acting under such advice, procured a Mr. *Jenks* to make the purchase on his behalf; of which the petitioner informed *A. B.*, who made no objection. That Mr. *Jenks* was accordingly declared a purchaser, and paid down a deposit; but on *A. B.* informing the auctioneer that the purchase was for the petitioner, and that there was no need of a deposit, the same was returned. The petitioner had no intimation or suspicion whatever, that he could not become a purchaser, or that the sale could be in any manner impeached. The conveyances were all prepared by *A. B.* for completing the purchase, and Mr. *Jenks* was then required to execute them; but on consulting his solicitor as to the nature of the transaction, the solicitor informed the parties that the purchase was invalid. The petitioner then became desirous of employing another solicitor; but *A. B.* refused to deliver up the papers, until his lien for his bill of costs was satisfied. The petitioner, under protest, paid the amount, 37*l.* 14*s.* 4*d.*, in order to get the papers out of *A. B.*'s hands; and he had also become liable to pay

1833.

Ex parte
BULL.

the auctioneer's charges, 27*l.* 14*s.* 2*d.* The petitioner charged, that *A. B.* must have been aware that the petitioner could not bid at the sale, without leave of the Court, and prayed the adoption of the sale to him, or for a re-sale, and the usual order in such cases; and that *A. B.* might be ordered to refund the costs paid him, and also pay the auctioneer's charges, 27*l.* 14*s.* 2*d.*

Mr. *Ching*, and Mr. *Bethell*, for the petitioner. There could be no doubt in the mind of any professional adviser acquainted with business, that such a purchase as this, without leave of the Court, would be invalid; and it was the duty of the solicitor to have known, and to have informed his client of this circumstance. [*Erskine*, C. J. Is not the proper remedy by an action on the case against the attorney for negligence?] We submit, that the solicitor being an officer of this Court, the Court has jurisdiction in this matter to make him refund. [Sir *G. Rose*. The first question is, whether this advice was given in the character of solicitor for the assignees, or merely as solicitor for the mortgagee. If in the latter, the Court has no jurisdiction over him.] He gave the advice in both capacities, and it is difficult to define in which in particular; and, for this reason, the Court should be the more watchful in preventing him from reaping profit from the injury he has committed.

Mr. *Russell*, for *A. B.*, the respondent, referred to the case of *Frankland v. Lucas*, before his Honor the Vice-Chancellor, where, after a strenuous argument by Sir *Edward Sugden* and Mr. *Knight*, in favour of such an application as the present, the Vice-Chancellor

decided that he had no jurisdiction, and left the party applying to seek his remedy by action.

1833.

Ex parte
BULL.

ERSKINE, C. J.—This Court will only exercise a summary jurisdiction over an attorney, when he is acting in the character of an officer of the Court, but not in a case merely between an attorney and his client. For the consequences of advice given to the assignees of the bankrupt's estate, in their character of assignees, whereby the estate is injured, the Court will hold an attorney responsible; but that advice must have some reference to, or bearing upon, the assets. Here it is plain that the advice was, at most, (if given at all, which is denied,) given to the petitioner in the character of an ordinary client. It had no bearing whatever on the assets; and therefore I do not see what jurisdiction we can have over the respondent. If the petitioner had not been an assignee on this occasion, the advice given him by this solicitor would have not been the less given in relation to a question in bankruptcy; but still it would not have been given in the character of solicitor to the commission.

The other Judges concurring,

The petition was dismissed with costs, as against *A. B.*; and it was ordered, that there should be a resale of the property, with liberty to the petitioner to bid; such sale to be before *Mr. Gregg*, who was to appoint a solicitor for that purpose, but without prejudice to any further proceedings which the petitioners might be advised to take.

1834.

Westminster,
January 18, 19.

Ex parte Sir CHAPMAN MARSHALL, Knt., and Sir WILLIAM HENRY POLAND, Knt., late Sheriff of Middlesex.—In the matter of JOHN FOX.

Where the bankrupt had entered into a joint bond with a co-obligor to indemnify the sheriff against any loss he might sustain from relinquishing the possession of goods seized under an execution, and no loss was actually sustained by the sheriff until after the issuing of the fiat :—Held, that the sheriff could prove no debt by virtue of the bond.

THIS was an appeal from a decision of the Subdivision Court, which had been made in this matter since the order of the Court of Review (a) upon the former hearing of this case. The petition, after reciting the former order, stated, that on the 2d November 1833 the petitioners paid to *A. H. Burt*, the solicitor of *James Mahoney*, the execution creditor, the sum of 600*l.*, which he agreed to accept, and did accept, in discharge of the verdict and costs in the above action. That the petitioners, in pursuance of the order of the 22d March 1833, tendered a proof of the said sum of 600*l.* to the Commissioner acting under the said fiat, and that he did not admit the said proof, but referred the matter to a Subdivision Court. That on the 30th day of November 1833, a Subdivision Court, consisting of *John Herman Merivale*, Esq., the Commissioner acting under the said fiat, and *John Samuel Martin Fonblanque*, Esq., and *Edward Holroyd*, Esq., also rejected the proof of the said petitioners for the said sum of 600*l.*

The petitioners prayed, therefore, that the order made by the Subdivision Court might be annulled. That the petitioners might be at liberty to call a meeting before the Commissioner acting under the said fiat, to prove for the said sum of 600*l.*, and the Commissioner be ordered to receive such proof; and that the costs of this and of the former application, and

(a) See ante, vol. 2, p. 589.

incidental thereto, might be paid out of the bankrupt's estate.

1834.

Ex parte
MARSHALL
and another.

Mr. *Swanston*, and Mr. *Bethell*, in support of the petition. The principle of the bankrupt law is to transfer all the property of the insolvent debtor to his creditors, and then to relieve him from all his debts and liabilities. But one of the great defects in the law as formerly administered was, that debts payable at a remote period were not within the provisions made for the relief of the bankrupt,—for he was held still liable on a covenant to pay an annuity, or a covenant in a lease. This monstrous injustice is now done away with by the legislature, and the 56th and preceding sections of the 6 G. 4. c. 16. are intended to supply the former defects in the law in this respect. The Court will not fail to remember, that in this case the bond was not forfeited before the bankruptcy, and that there was then no present demand of the petitioners, but that the contract eventually gave rise to a subsequent demand. Now this was the case which especially needed a provision; the 56th section therefore was framed to enable the creditor to have a value set upon his debt, and prove it before the actual demand might arise out of the contract. For the 56th section would be of no use, if it was to be held to apply merely to bonds already forfeited; for these were provable before the statute. The previous sections of the act include various kinds of debts and demands, which were not ripe for payment, and could not be claimed at the period of the bankruptcy. Thus, the 51st section applies to debts payable at a future day—the 52d, to sureties for the bankrupt paying his debt after the

1884.

Ex parte
MARSHALL
and another.

bankruptcy,—the 53d to obligees in bottomry or respondentia bonds, and to the assured on policies of assurance—the 54th and 55th sections to annuity creditors, and sureties for the payment of the annuity,—and then the 56th section enacts, that if the bankrupt shall, “before the issuing of the commission, have contracted any debt payable on a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the Commissioners to set a value upon such debt, and the Commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.” The legislature appears to have adopted in this section the provisions contained in the 53d as to *respondentia* bonds, which are instruments prospective in their nature, referring to the occurrence, or non-occurrence of the event. The contingent debts included in the 56th section are of two denominations; 1st, where the time of payment is uncertain,—as where a sum of money is payable, if *A.* survives *B.*; and 2dly, an obligation to pay another man’s debts, which can have no value set upon it by any mathematical calculation. Now, can it be contended, that the claim on this bond is not within the

second part of the 56th section. It may be urged, perhaps, that there was no debt contracted in this case. But the common understanding has always been, that the penalty of a bond is, in law, a debt contracted; not, in general, payable immediately, but payable on the happening of a contingency. If the statute only meant, as the other side contend, to make those bonds capable of proof, which amount to contracts to pay a present debt, all the provisions of the 56th section would be unnecessary. In *Ex parte Myers (a)*, which was a case before this Court, arising out of the construction of the 56th section, where the bankrupt had guaranteed to *A.* the payment of certain bills which *A.* had accepted in favour of *B.*, and the acceptances were not due at the time of the bankruptcy, it was held, that after the acceptances had become due, and *B.* had neglected to provide for them, *A.* was entitled to prove the amount as a contingent debt within the meaning of the 56th section. Now, the question in that case was exactly what arises in this. In both cases the amount was uncertain at the time of the bankruptcy, and the event also. If there is any distinction, the obligation is stronger here, being on a bond. No one ever doubted that a guarantee was a debt contracted, but the peculiarity of it was, that it was payable at a future time, and upon a contingency.

But it might be contended in this case, that the bond was forfeited before the bankruptcy; for an action was brought against the sheriff on the 10th December 1831, and the fiat did not issue until the 1st May 1832. [Sir *J. Cross*. Are you aware of the case of *Challoner v. Walker (b)*, where a bond of indemnity was given to

1834.

Ex parte
MARSHALL
and another.

(a) 2 Dea. & Chit. 261; 1 Mont. & B. 229.

(b) 1 Burr. 574.

1834.

Ex parte
MARSHALL
and another.

save the obligee harmless against a claim of dower and all costs, charges, &c., and the Court held, that the filing of a bill in Chancery was a damage occasioned to the obligee, and that he was not obliged to wait till the determination of the suit, in order to bring his action for a breach of the condition of the bond?] [*Erskine*, C. J. It has also been decided, that where a bond was to indemnify against "all actions, suits, claims, &c.," the bringing an action against the obligee was held to be a forfeiture of the bond. But here the words in the condition are, "all loss, charges, damages, costs, and expenses."] There was a good and valuable consideration given by the sheriff to the obligors for entering into this bond, namely, the delivery up to them, at their request, of the goods and chattels which he had seized under the writ of *fi. fa.*, and which were then lawfully in his possession. Here, therefore, is a positive engagement to pay a certain sum in a certain event, and a good consideration for that engagement to the party entering into it. The case is altogether different from that of a mere surety, where there is no valuable consideration moving to the surety himself, but only to the party for whom he becomes surety.

Mr. *Twiss*, and Mr. *Rogers*, for the respondents. When this case was before the Court on the former petition, the Court expressed no opinion whether the proof should be admitted or not. We are therefore entitled to treat the present question as *res integra*. There may, at first sight, appear some conflict between the cases of *Ex parte Thompson* (a), and *Ex parte*

(a) 2 Dea. & Chit. 126; 1 Mont. & B. 219.

Myers (a); but the two decisions may be found on examination to be not inconsistent with each other. In the one case, the claim was on a guarantee, which was held to be a debt contracted; in the other, the claim was founded on the covenant of a surety to pay an annuity, on the default of the principal, who had made no default before the surety became bankrupt; and this was held not to be a debt contracted by the surety. In *Ex parte Myers* there was a certain debt—not so here. Nothing is included in the 56th section, which is not a debt contracted by the bankrupt; and the sheriff had not such a special property in the goods seized by him, as was sufficient to work out a consideration for a debt, by the delivery of them to the obligors of this bond. But even if the demand in this case were to be considered a debt, it was not capable of valuation within the terms of the 56th section. If a father, on the marriage of his daughter, binds himself to pay, after his death, a certain sum of money as her marriage portion, the bond would be there capable of valuation; but here it was impossible to put a value upon the contingent liability of the obligors created by this bond. In *Taylor v. Young* (b) it was decided, that a bond by the assignee of a lease, for the payment of rent and the performance of covenants in the lease, and for indemnifying the lessee against the non-performance of the covenants,—though forfeited before the bankruptcy of the obligor,—could not be proved under his commission; as it was incapable of valuation. And in *Ex parte The Lancaster Canal Company* (c), it was held, that where a joint and separate bond was

1834.

Ex parte
MARSHALL
and another.

(a) 2 Dea. & C. 251; 1 Mont. & B. 229.

(b) 3 B. & Ald. 521.

(c) Mont. 27.

1894.

Ex parte
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given by the bankrupts to pay certain balances "when thereunto required," and no demand had been made upon them before their bankruptcy, there was not a sufficient breach of the condition to constitute a debt provable under the bond, within the 56th section of the 6 Geo. 4. c. 16., because there was *no existing debt*. Then, what is there in that statute, which makes a bond of this sort more provable. The other side would endeavour to make the 56th section a sort of drag-net, to include all manner of claims which are not within the previous sections. But many of those sections are more comprehensive in terms than the 56th; for in some of those the words "*demand*" and "*liability*," are used; but the 56th section is strictly confined to the term "*debt*." If it were not so confined, all unliquidated damages would be then capable of proof. In *Ex parte Thompson* (a), the Chief Justice says, "the first step to be taken is, to ascertain whether any *debt* is actually contracted at the time of the bankruptcy. If no debt is contracted, the ulterior requisites as to the value become superfluous." Another mode of trying whether this bond was provable, will be to examine, whether it could be the subject of set-off by the sheriff in an action brought against him by the assignees. In *Sampson v. Burton* (b), which was a case under the former Bankrupt Act, it was held that a guarantee against contingent damages could not form the subject of a mutual credit under the 5 Geo. 2. c. 30. s. 28. So, in the more recent case of *Rose v. Sims* (c), it was held, that a contract by a party to indorse a bill of exchange was not a subject of mutual

(a) 2 Deac. & C. 126; 1 Mont. & B. 219.

(b) 2 Brod. & B. 89.

(c) 1 B. & Adol. 521.

credit within the 6 *Geo.* 4. c. 16: s. 50., and could not be set off by the assignees of the party to whom it was given, against a debt due to him from the bankrupt; as the clause of mutual credit applies only to debts, or transactions which must end in debts. Now the contract in the present case is not a transaction of that description. The contingency meant by the 56th section is the contingency of the payment of the debt, not a contingency whether it may ever become a debt. In *Boorman v. Nash* (a), where the right of the plaintiff to maintain the action depended upon the question, whether he could, or could not, have proved his demand under the commission of bankruptcy issued against the defendant, Lord *Tenterden* said, it was impossible that he should so prove it; for at the time when the commission issued it was uncertain, not only what amount of damage, but whether any damage, would be sustained. [*Erskine*, C. J. referred to the case of *Yallop v. Ebers* (b), where a defendant, on certain conditions, having undertaken to pay the balance due on a bill of exchange, of which the plaintiff was acceptor,—and having afterwards, by a new undertaking, engaged to deliver up the acceptance to the plaintiff within a month, or to indemnify him against it,—and the plaintiff having been obliged to take up the bill, after the defendant had become bankrupt and obtained his certificate,—it was held, that the plaintiff could not prove in respect of it under the commission, either for a debt not payable at the time of the bankruptcy, or for a contingent debt, or in the character of a surety; and therefore that the bankruptcy was no defence to the action.] The demand in the present case is not the

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(a) 9 B. & C. 152.

(b) 1 B. & Adol. 698.

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more a *debt*, because it may be referred to the bond; for in *Taylor v. Young* (a), Mr. Justice *Holroyd* says, “in the case of a bond with a penalty, the penalty is not the debt actually proved; but that, which is proved by reason of a penalty, is that which can be valued as a debt.” The penalty of a bond, therefore, is no more a debt, than a statutable penalty is a debt before judgment recovered, because the informer is obliged to sue for it in an action of debt. So, where a party had become bail for a bankrupt upon the bankrupt’s undertaking to indemnify him, and ten months after the bankruptcy the bail was obliged to pay the debt and costs,—it was held, that the bail could not prove the amount under the commission, because he could not swear that the debt was due and owing to him before he actually paid the debt and costs; *Goddard v. Vanderheyden* (b). In *Atwood v. Partridge* (c),—where the defendant had covenanted with the plaintiff for the due payment by *A. B.* of a premium upon a policy of insurance, and the premium becoming unpaid after the defendant’s bankruptcy, it was paid by the plaintiff,—*Best*, C. J. said, it was clear that this was not a debt within the 56th section of the 6 Geo. 4. c. 16., either contingent, or otherwise.

Then, with respect to what has been said about the delivery of the goods by the sheriff forming a good consideration for the bond,—the sheriff had no property in the goods, but the mere possession of them as a public officer. Could the sheriff have proved for the value of these goods, excepting the bond as a security? Clearly not; the goods were in *custodiâ legis*, and the sheriff could exercise over them no right of ownership. But sup-

(a) 3 B. & Ald. 529. (b) 3 Wils. 262. (c) 4 Bing. 209.

posing the value of the goods could constitute a debt due to the sheriff, yet when a bond is given for a debt, the original debt is merged and gone; the debt in this case, therefore, must stand on the bond, or not at all. Now the penalty of a bond is no debt, until breach of the condition; and even then the penalty cannot be recovered in an action, but the plaintiff must have a writ of inquiry to ascertain what damage he has sustained, before he can sue out execution. [Sir *J. Cross*. The material case since the 6 *Geo.* 4. c. 16., as to the proof of contingent debts under the 56th section, appears to be *Ex parte Grundy*(a).] In *Ex parte Myers*(b), which has been relied on by the other side, the bankrupt, by the terms of the guarantee, was a principal as well as a surety; and this is the reason why Sir *J. Cross* said in that case he concurred in the judgment of the Court.

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Mr. *Swanston*, in reply. There is no doubt that the debt we seek to prove is founded on a valuable consideration, namely, the value of the goods delivered up by the sheriff. He was in the lawful possession of these goods; he had such a possessory right, that no one could take them out of his hands; and in consideration of the bond, he gives them up to the bankrupt. I contend, therefore, if it had been no breach at all of the condition of the bond, the sheriff would, under these circumstances, have been able to maintain a proof. The question of consideration will dispose of nearly all the cases cited in support of the argument on the other side; for most of them are cases of sureties, where there is no consideration, except the original one

(a) Mont. & M. 293.

(b) 2 Deac. & Ch. 259.

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to the principal. In the second branch of the 56th section of the 6 Geo. 4. c. 16., the legislature has introduced a new mode of proceeding relative to the proof of contingent debts. Before that statute, the act of bankruptcy annihilated all the acts and dealings of the bankrupt, and it was found necessary to modify that law. Formerly, if a debt required any after act (subsequent to the debtor's bankruptcy) to ascertain its amount, it could not be proved. It must have been certain, that is, ascertained, or ascertainable, without any reference to future events. The case of *Goddard v. Vanderheyden* (a), which has been already referred to, shows the reason of the difficulty that formerly existed, in admitting the proof of a debt not ascertained until after the bankruptcy. The difficulty was, that the creditor was obliged to swear that the bankrupt was indebted to him *at the date and sing forth of the commission*. In giving the judgment of the Court in *Goddard v. Vanderheyden*, Lord Camden (b) says, "A debt may be due at the time of the bankruptcy, though not demandable till some time afterwards; and therefore the statute, 7 Geo. 1. c. 31., was made to let in such debts to be proved under the commission; and though the preamble of that statute speaks only of bonds, &c. given for goods in trade, yet the enacting words extend to all sorts of bonds for payment of money, and the words *such security* do not mean security for such a sort of debt, but security by bonds, bills, notes, &c." I cite this judgment in order to show

(a) 3 Wils. 262.

(b) This case was decided in the Court of Common Pleas, in Michaelmas term 1771, when Lord C. J. *De Grey* was the Chief Justice, Lord *Camden* having ceased to be Chief Justice in Trinity term 1766, when he was promoted to the office of Lord Chancellor.

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that in our case there was a debt subsisting at the time of the bankruptcy. [Sir J. Cross. I beg to call your attention to the 52d section of the 6 Geo. 4. c. 16., which provides for the proof on bail bonds, where the bail pay the debt after the commission issues. It is very remarkable, that the legislature should have provided expressly for a bond relating to the debtor's *person*, and not for a bond relating to his *property*.] [Erskine, C.J. How would you shape your proof in this case, supposing you were entitled to prove on this bond?] We should state that the bankrupt, at the date and suing forth of the commission, was indebted to the sheriff upon and by virtue of a certain bond, the damages on which were not ascertained until after the issuing of the commission. The reason why a contingent debt, before the 6 Geo. 4. c. 16., could not be proved was, not because there was no debt, but because there was something still to be ascertained. Will any one say, that the relation of debtor and creditor does not exist between the parties to this bond? The debt is existing, though the right of action to recover it may not accrue for some time. In the administration of assets under a will, can it be contended that a bond of this kind would not be considered a debt? By the 135th section of the 6 Geo. 4., it is declared that the act shall be construed beneficially for creditors. The Court therefore, in this instance, where a creditor seeks to prove, ought not to be fettered by the use of the technical term "debt," in the 56th section. The first branch of that section relates to cases, where a debt can be valued before the happening of the contingency; the second branch relates to cases, where no value has been set upon the debt, or where it could not be valued,—and it then pro-

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vides, that when the contingency does happen the creditor may prove. [Sir *J. Cross*. Can you contend that the fifty-sixth section, by the expression "contingent debt," includes not only the event, and the time of payment, but also the *amount*?] That is certainly what I am now contending for. It has been said, there is no distinction between a bond and a contract. I say, there is a material difference. A *bond*, by which the party binds himself in a penal sum, is, in law, a present debt, subject to be reduced hereafter, according to the terms of the condition. But a *contract* to pay a sum of money on a certain event, does not amount to a debt, until the event occurs. In *Ex parte Grundy*(a), which has been referred to by the Court, the bankrupt covenanted by his marriage settlement to pay 2000*l.*, in case his intended wife, or any issue of the marriage, should survive him. In that case, therefore, the debt was not payable *by the bankrupt*, and never could be payable by him; and yet Lord *Lyndhurst* held, that the 2000*l.* was provable *as a debt* under the commission. [Sir *J. Cross*. In *Ex parte Tindal*(b), which was a case of a similar description, the value of the debt was easily ascertainable, being, as Lord C. J. *Tindal* observes, in his judgment(c) "the present worth

(a) Mont. & M. 293.

(b) Mont. 375, 462; 1 Dea. & Ch. 291. This case affords a curious specimen of the delay and uncertainty of litigation, and is also a remarkable instance of the difference of opinion entertained by learned persons, in applying law to fact. The proof of the debt was, in the first instance, rejected by the commissioners, in 1828,—their decision was reversed by Sir *Lancelot Shadwell*, the Vice-Chancellor, in 1829, (1 Mont. & M. 415,)—his decision was reversed, upon appeal, by Lord *Lyndhurst*, (*Id.* 422,)—and his decision was finally reversed, upon a re-hearing, by Lord *Brougham*, assisted by Lord C. J. *Tindal*, and Mr. Justice *Littledale*, in 1832.

(c) Mont. 467.

of 4000%. payable twelve months after the death of the bankrupt.”] But what reason can there be for requiring the ascertainment of the debt before the commission, as a condition precedent to the proof, when the second branch of the 56th section expressly reserves the right of proof until after the contingency shall have happened? I say, the penalty of the bond was a debt contracted. If all the contingent circumstances contemplated by the condition of the bond had occurred before the bankruptcy, instead of afterwards, would not the proof have been upon the bond? This shows that the debt, whether provable before or after the bankruptcy, was still contracted by virtue of the bond. In *Yallop v. Ebers*(a), which has been referred to by the Chief Judge, the question was, whether the debt in that case was barred by the certificate; and Mr. Justice *Littledale* assigns, as the ground of his judgment, that no debt could be said to have subsisted between the plaintiff and defendant before the certificate; and that their agreement could not convert the plaintiff, who was acceptor of the bill, from a principal into a surety. In *Ex parte Myers*(b), it has been said there was a certain debt contracted by the bankrupt. But that is not so; the debt was not contracted by the bankrupt, but by third persons, for whom the bankrupt was guarantee. The question there was, to what amount the bankrupt was liable, in case the third persons did not pay the debt contracted by them; and the debt in the present case is quite as certain, as in *Ex parte Myers*. The result of our argument amounts to this, that though the Court may think no proof could be made upon this bond, within the first branch of the 56th sec-

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(a) 1 B. & Adol. 698.

(b) 3 Dea. & C. 251.

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tion, before the happening of the contingency,—yet that now the contingency has happened, and the amount of the debt is ascertained and certain, the petitioners have a clear right of proof within the second branch of that section.

ERSKINE, C. J.—This case has been well argued on both sides, and is one in which, I must admit, there is considerable difficulty; but I think, in arriving at a decision upon it, there is no necessity for interfering with the case of *Ex parte Myers*(a), or *Ex parte Thompson*(b). In *Ex parte Thompson* the Court was of opinion, that there was no debt contracted by the bankrupt at the time of the bankruptcy; inasmuch as the default by the principal, for whom the bankrupt was surety, was a condition precedent to the accruing of the debt, and no default had been made by the principal before the bankruptcy. Now, in *Ex parte Myers* the Court thought there was a debt existing at the period of the bankruptcy. The guarantee there given by the bankrupt was to secure the payment of three bills drawn by his agents on the petitioners, for the purpose of raising money for the accommodation of the bankrupt; and, though the bills were not paid by the petitioner until after the bankruptcy, yet the debt was contracted before; it was, therefore, “debitum in presenti, solvendum in futuro.” With respect to the present case, it cannot be said, that the bond was forfeited before the issuing of the commission; and I find this distinction invariably taken in all the cases. Where a bond was given for the payment of an annuity, and the annuity was not payable before the issuing of the commission,

(a) 2 Dea. & Ch. 251; 1 Mont. & B. 229.

(b) 2 Dea. & Ch. 126; 1 Mont. & B. 219.

it was held that there was *no debt* on which you could fasten the equitable relief, of permitting the creditor to prove for the value of the annuity. In this case, whatever inference may be drawn from the general words used by the statute of 6 Geo. 4. c. 16. in some of its clauses, it is clear, that the 56th section means the debt contracted by the bankrupt to be a debt existing antecedent to the commission. But treating this as a contract by the bankrupt to pay a sum of money to the sheriff, for a good and valuable consideration received of the sheriff by the bankrupt, I think there, also, the argument fails. The sheriff, in taking possession of the goods under the execution against *Suwerkrop*, was merely an officer of the law,—the goods were *in custodia legis*, and he himself had no property in them whatever. He delivers up the goods to *Suwerkrop's* assignees, in consequence of a claim made by them that the goods belonged to them as such assignees, and not to *Suwerorop*, or the execution creditor; and, in order to indemnify himself against the consequences of parting with the goods, he takes a bond of indemnity from the assignees. But this bond involved no contract on the part of *For*, and his co-assignee, to pay for the value of goods, as belonging to the sheriff; but it was merely to save him harmless from any loss, that might accrue to him from complying with the demand of *Suwerkrop's* assignees. Until the sheriff was damnified, therefore, no debt could possibly arise by virtue of this contract of indemnity. Then, when was he damnified? Not until after the issuing of the commission against *For*, against whose estate this bond is sought to be proved. I will look into the different cases that have been cited in the argument, and if I should alter my

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opinion, I will mention it to the counsel for the parties concerned. But, at present, I think the Subdivision Court was right in rejecting the proof, and that this petition must be dismissed.

Sir J. Cross wished to have further time to consider his judgment in so important a case.

Sir G. Rose.—To save the parties the expense of coming to this Court again, I think it better to deliver my judgment now, entertaining, as I do, no doubt whatever on the case before us. The question is, whether or not the sheriff can prove upon this bond under the commission against *Fox*, who is one of the obligors. If there had been a forfeiture before the bankruptcy, then, of course, there could be no doubt. But the language of the statute, it appears to me, puts the case in a very narrow compass. Was there any debt contracted payable on a contingency? Would an executor, in the administration of assets, be considered liable on this bond, as on a debt by his testator? The sheriff having, in the condition of the bond, reduced into language the terms upon which he was willing to part with the possession of these goods,—it is very clear, that he made no assertion of property, but merely took an indemnity on withdrawing possession. In this case, the debt is not created by the obligation, but by the circumstances, on the happening of which the condition is to operate. The principle, on which *Ex parte Thompson*(a) was decided, was this,—there was, in that case, no covenant of the bankrupt to pay a debt, but merely an engagement to pay an annuity, in case of the default of a

(a) 2 Dea. & Ch. 126.

person for whom he was surety. He could, therefore, be only said to contract the debt, if the grantor did not pay the annuity. When there is a contract to secure the payment of a debt owing by another person, there must be some subsequent act done, or omitted, by the principal debtor, to convert the contract of the surety into a debt. So, in *Ex parte The Lancaster Canal Company*(a), the principle on which the Court decided that case was,—that the bankrupts (who were trustees for a corporate body) had covenanted, *when required*, to pay all balances in their hands, and that *no demand* had been made before their bankruptcy. Then what was determined in *Ex parte Myers*(b)? That was the case of a guarantee by the bankrupt to secure a debt, where the contingency had happened before the bankruptcy; and therefore it was held, that the creditor could prove the amount of the guarantee against the bankrupt's estate. In some cases of a guarantee, it has been held that the debt would sustain a commission,—as in cases of covenant for the delivery of stock, and so in other cases, where the value and amount of the stock could be ascertained. There is this difference between the cases of *Ex parte Thompson*, and *Ex parte Myers*, that in the one there was no debt contracted before the bankruptcy, and in the other there was. I am anxious, if it could be done, that the bond, in this case, should be considered mere form and surplusage, and that the sheriff should be admitted to prove for the value of the goods. If it could be put that the sheriff had the slightest claim of property in these goods, or dealt with them as his own, when he delivered them to the assignees, we

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(a) Mont. 27.

(b) 2 Dea. & Ch. 251.

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might then, perhaps, have viewed the matter in a different light. But he did nothing more than withdraw from the possession of them in his character of sheriff, on being indemnified by the persons who claimed them as their own. If, again, there had been an undertaking on the part of *For*, and his co-assignee, to return the value of the goods to the sheriff, in case he had been made responsible for them, then, also, as in the case of a covenant to replace stock, it would have been a question whether the value could not have been calculated, and the amount proved. But nothing of this description can be gathered from the facts of this case. Taking it, therefore, that we are right in our conclusion that this is not a provable debt, I think it is due to the parties concerned on this petition, that we should not defer our judgment.

ERSKINE, C. J.—There is one case which marks very clearly the distinction between bonds forfeited, and those not forfeited till after bankruptcy. It is that of *Perkins v. Kempland* (a), where it was held, that a bond forfeited *before* bankruptcy, became a debt at law; but not where forfeited *after* bankruptcy.

Mr. *Twiss* said, that if the petition was finally dismissed, the assignees would not press for costs.

The case, however, was ordered to stand over for final judgment.

Southampton
Buildings,
February 21.

On this day the CHIEF JUSTICE pronounced the final

(a) 3 Bl. Rep. 1106.

judgment of the Court. After recapitulating the facts of the case, his Honor proceeded as follows:—

The question has been for the first time properly raised for discussion, on this petition, whether the loss incurred by the sheriff after the bankruptcy, constituted a debt provable under the fiat.

On the part of the petitioner it was urged, that it was a contingent debt, within the meaning of the 56th section of the 6 Geo. 4. c. 16.

On the part of the assignees it was insisted, that to bring a case within that section, there must be an existing debt at the date of the commission, and that in this case there was no debt, until the sheriff was actually damnified by the payment of the money.

The Court was alternately pressed by the cases of *Ex parte Thompson, re Wyatt*, and *Ex parte Myers, re Sudell*. At the time of the argument of the case, I entertained no doubt of the soundness of the decision of the learned Commissioners, who rejected the proof, and I stated my opinion on the point; but as, upon referring to the reports of the case of *Ex parte Myers*, it appears to me that I have gone further than the authorities, upon closer examination, will warrant, I wish to avail myself of the reservation of our final judgment on this petition, by pointing out more precisely the view which I take of this question. In my judgment, in *Ex parte Myers*, I have not sufficiently marked the distinction between contingent liabilities that may never become debts, and contingent debts that may never become payable. Upon the fullest consideration of all the reported decisions, I am satisfied that claims under the first class, upon which no debt has arisen until after the bankruptcy, cannot be proved under the

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56th section ; but that all claims falling within the latter class, that are either capable of valuation before the contingency happens, or have become payable by the happening of the contingency after the bankruptcy, and before proof is tendered, may be admitted. The case of *Ex parte Thompson, re Wyatt*, is an example of the first class. The case of *Ex parte Myers, re Sudell*, was decided as belonging to the second class. In the case of *Ex parte Thompson*, there was no debt due from any one until after the bankruptcy. In *Ex parte Myers*, a debt had been clearly contracted with the holders of the bills before the bankruptcy for a specific sum, which the bankrupt had engaged to pay, unless he should be released from his obligation by the drawers taking up the bills. Whether, in deciding that case, we sufficiently adverted to the distinction between guaranties for the re-payment of monies actually advanced, or for the payment of goods sold and delivered to third parties before the bankruptcy,—and guaranties for the payment of securities current at that time,—may perhaps be a fit subject for consideration, whenever a similar case may arise. It is enough here to say, that no such point arises in this case.

The broad question that presents itself on this petition is, had the bankrupt contracted any debt before the issuing of the fiat against him? In order to answer this question, we must see what had actually taken place before that date. The sheriff had relinquished certain goods which he had seized as *Suercrop's*, and had returned that there were no goods of *Suercrop's* in his bailiwick. By his own return, therefore, he is estopped from setting up any claim, as upon a sale of the goods seized ; and his whole case must rest upon

the contract of indemnity, as evidenced by the bankrupt's bond. That a mere contract to indemnify creates no debt till a loss has been actually incurred, has been too often decided to become now a question for argument. The cases of *Young v. Hockley* (a), *Chilton v. Whiffen* (b), and *Hoffham v. Fourdrinier* (c), are decisions upon this point. Does the circumstance, then, of this contract to indemnify being secured by a bond, make any difference? If the bond had been forfeited before the bankruptcy, and the penalty thereby converted into the nominal debt, the argument would have rested upon a very different foundation; for in that case, though the loss incurred would be the measure of the debt provable, still it might truly be said, that the debt had been contracted before the bankruptcy, although the amount to be paid depended upon an event then resting in contingency. And it was upon the basis of the penalty becoming a legal debt, upon the forfeiture of the bond, that the Chancellor sitting in bankruptcy founded his power, before any specific enactment with respect to annuities was introduced, to admit an annuity creditor to prove not only for arrears due before the bankruptcy, but for the full value of the annuity.

But the distinction has always been taken between bonds forfeited before bankruptcy, and those forfeited after; a distinction which is strikingly illustrated by the case of *Perkins v. Kempland* (d), to which I referred on a former occasion. In that case it appeared, on motion, that a bond had been given by the defendant to secure the payment of an annuity, which had not

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(a) 2 Bl. Rep. 839.

(b) 3 Wils. 13.

(c) 5 M. & S. 21.

(d) 2 Bl. Rep. 1106.

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been forfeited till after the bankruptcy of the defendant, who had obtained his certificate, and was afterwards sued by the plaintiff on the bond. The Court were of opinion, that as the bond was not forfeited at the time of the commission, there was no debt then due at law ; but that it was a mere contingency which might, or might not, become a debt *in futuro*. " All the cases in Chancery are where the bond is actually forfeited ; to redeem which forfeiture, it is allowed that a value be set on the annuity. But neither there, nor at law, can the debtor be protected, for a debt that arises after the date of the commission." But afterwards it was moved again upon fresh affidavits, by which it appeared, that though the arrears had been paid up at the time of the commission issuing, the bond had been previously forfeited more than once. And by *De Grey*, C. J. and the whole Court:—" The defendant has made a new case, which is now as clearly for him, as the former was against him. The bond being forfeited, became a debt at law. The equitable redemption of the forfeiture by payment of the arrears, and the growing annuity, was the proper subject of valuation ; and the debt so appreciated ought to have been proved under the commission."

The same distinction is also clearly explained by Lord *Eldon* in *Ex parte Thistlewood* (a), in which his lordship says, " The original cases in bankruptcy considered the penalty of the bond as the debt, not however to be received, but to stand as a security for the annuity. Lord *Hardwicke*'s rule originally was, if there were sufficient assets, to pay the annuity half-yearly ;

(a) 19 Ves. 245.

the debt giving a right to receive under the proof the annuity itself out of the assets, if the state of the assets permitted, down to the death of the annuitant. The course afterwards changed to setting a value upon the annuity, to be proved as a debt, which Lord *Hardwicke* put upon the convenience of distribution. Previously to the statute 49 *Geo. 3.*, if the annuity was secured by a covenant, the arrears only could be proved; if secured by bond and covenant, and there had been no forfeiture, nothing could be proved; but if a failure had occurred, there was this difference between a bond and a covenant,—that under a covenant, the arrears only could be proved,—but under a bond forfeited before the bankruptcy, the value of the annuity, as well as the arrears; and this clause in the late act of parliament only provides, that in order to give the annuitant some part of the property, it is no longer necessary that there should have been a breach of the condition of the bond.”

The statutes which have thus made provision for the proof of annuity-bonds, though not forfeited before the bankruptcy, have made no such provision for bonds such as that which forms the subject of the present discussion; and therefore the penalty of this bond, not having been forfeited before the bankruptcy, cannot be considered as a debt existing at the date of the commission; and if the penalty was no debt at that time, there was no debt at all until the money was paid by the sheriff; which was too late to give the sheriff any right of proof.

The petition must therefore be dismissed, according to the provisional judgment of the Court delivered on a former day.

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November 21,
December 11,
1833.
January 15,
March 14,
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Ex parte EDWARD LUCAS and WILLIAM HUNTER.—

In the matter of THOMAS OLDHAM.

And in the matter of JOHN EDGE.

A., before his bankruptcy, agrees to take a lease of a cotton mill, and enters into possession. After his bankruptcy one of his assignees takes possession, and agrees to accept the lease, a draft of which was sent to the assignees, containing covenants personally binding on them during the whole of the term, and one, in particular, to prevent them from assigning without the licence of the lessor:—Held, that the assignees were not bound to accept of such a lease; and even if they were, that the Court of Review had no jurisdiction to compel a specific performance of the agreement.

THIS was a petition of the assignees of *Thomas Oldham*, the first-named bankrupt, for an order on the assignees of *Edge* to accept a lease.

The petition, and affidavit in support of it, stated, that in the year 1825, and up to the time of his bankruptcy, *Oldham* was possessed of certain premises, with full power to mortgage and demise the same; and that in October 1825 he mortgaged them to *George Gardner* and *James Collier Harter*, for securing to them the repayment of a certain sum of money then due to them, and also to secure further sums to be advanced. On the 29th December 1829, *Oldham* agreed to let the premises upon lease to *John Edge* for 14 years, at the yearly rent of 200*l.*; and *Oldham* and *Edge* signed a memorandum of agreement as follows:—"Mr. *Oldham* agrees to let to Mr. *Edge* the factory at Torr New Mills, Derbyshire, now converted into a print work, for the term of 14 years, at the rent of 200*l.* per annum. Mr. *Edge* is to find security for the amount of utensils as per valuation; and when they are paid for, the rent is to be reduced at the rate of 7½ per cent. per annum, on the sum so paid. The tenant to enter into the usual covenants as to repairs &c. Signed, *Thomas Oldham*, *John Edge*. December 29, 1829."

On the 30th December 1829, *Edge* waited on Messrs. *Walker* and *Jesse* of Manchester, solicitors, and gave them instructions to prepare a lease of the

premises; and one of the firm, upon that occasion, took down in writing the instructions so given, viz. " Lease for 14 years from *Gardner, Harter, &c. &c.* as mortgagees, and Mr. *Thomas Oldham*, to *John Edge*, of New Mills, Derbyshire, printer, of the cotton mills, buildings &c. which have lately been converted into premises for the purposes of calico printing; and also the water-wheel and main geering fixed or belonging to such water-wheel (*vide* description), rent 200*l.* payable quarterly. Mr. *Edge*, on payment of 443*l.* 10*s.* for divers utensils now on premises, to have the rent reduced, during the remainder of the term, 33*l.* per annum. Mr. *Edge* to keep the whole of the premises, both inside and outside, in repair, to pay the taxes &c., as usual with tenants; not to let &c. without consent &c."

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Under this agreement, *Edge* entered into possession December 30, 1829, and continued in possession till his bankruptcy, and paid to *Harter*, one of the mortgagees, 200*l.* for one year's rent, but did not pay for the utensils. The draft lease was prepared according to the instructions; but the draft remained in the solicitor's hands till 11 December 1830, when they forwarded it to Mr. *Walmsley*, the solicitor of *Edge*, for his approval. Mr. *Walmsley*, in March 1831, called on *Walker* and *Jesse*, to claim a set-off against the second half year's rent, which had not at that time been paid; but made no objection to the draft, although it had been two months in his possession, nor did *Edge* object to it. A commission of bankruptcy issued against *Oldham* on the 15th March 1831, and the petitioners were chosen his assignees. A commission of bankruptcy also issued against *John Edge* on the 24th July 1831; under which *Thomas Slatter*, *Richard*

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Jackson, and *Thomas Boothman* (who was a coal dealer) were chosen his assignees. According to the belief of the petitioners, it had been agreed between *Edge's* assignees and his creditors, that the assignees should carry on his business for the benefit of his estate; for they, immediately after *Edge's* bankruptcy, entered into possession of the premises, and *Thomas Slatter*, as one of such assignees, had ever since carried on the same business upon the premises; *Thomas Boothman* supplying the coals used in the works; and *Edge's* assignees, or *Slatter* on their behalf, paid the rent of 200*l.* as it became due.

Various applications were made to *Slatter* by Messrs. *Walker* and *Jesse*, as the solicitors of the petitioners, urging him and his co-assignees to take the lease; and in June 1832 *Slatter* informed Messrs. *Walker* and *Jesse*, that the assignees had determined to take the lease. Another draft of the intended lease was accordingly prepared, corresponding with that proposed to be made to *Edge*, except only in placing his assignees in his stead; and this last draft was delivered to *Slatter* on the 19th June 1832. The assignees kept the draft till the 24th November 1832, when they objected to several clauses in it, and declined to take it in its then shape. One of the covenants was, that the assignees would not assign the lease, without the licence of the lessor; and all the covenants were personally binding on the assignees, their executors and administrators, during the whole of the term demised.

The petition prayed, therefore, that the assignees of *Edge* might be ordered to accept the lease, as prepared,—or that it might be referred to the Registrar of

the Court to settle and approve of a lease; and that *Edge's* assignees might pay the costs of the application.

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By the other affidavits, it did not appear that *Jackson* had at all interfered in this matter.

Mr. *Swanston*, for the petitioners. The petitioners come before this Court, under the 75th and 76th sects. of the 6 *Geo.* 4. c. 16., not so much to compel the assignees of *Edge* to elect,—but, as we say, after they have elected to abide by the agreement, and to execute the lease which has been prepared. [Sir *G. Rose*. At the outset of the argument on this case, I think it right to direct your attention to the question, whether we have any jurisdiction upon this petition. Do you know of any instance, in which a petition in bankruptcy against assignees was ever entertained, for compelling the specific performance of an agreement to accept and execute a lease, and to enter into the usual covenants? If you put it on the ground, that the assignees have already elected, your only remedy to compel them to do what you now seek is, by action, or by bill in equity.] In *Ex parte Johnson, in the matter of Scott* (a), before this Court, a married woman, the wife of the bankrupt, was by consent ordered specifically to convey. And there is another case much stronger, where a purchaser of a bankrupt's estate before the master was compelled to perform his contract; *Ex parte Gould, re Harvey* (b). [Sir *G. Rose*. It is much easier to say that that decision is wrong, than to imagine that this application is proper: In that case the purchaser did not even appear, much less was any argu-

(a) 28 November 1832.

(b) 1 G. & J. 231.

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ment gone into, that could raise this question. Even if the assignees enter into an actual contract, I think it quite clear, that this Court could not entertain a jurisdiction to enforce their performance of it, on petition, or otherwise. And I think a demurrer was once allowed upon this very ground (a).] In *Ex parte Cowan* (b), the Lord Chancellor had exercised a jurisdiction, on petition, to award damages; and on application to the King's Bench for a writ of prohibition, the writ was refused. In that case, notwithstanding the commission had been superseded, the Lord Chancellor was held to exercise a legal jurisdiction over the assignees. Here the assignees of *Edge* have bound themselves in their character of assignees. Now, as this Court has jurisdiction over assignees in all matters relating to their bankrupt's estate, it is manifest that if they, in their character of assignees, enter into any contract on behalf of the estate, this Court has jurisdiction to enforce the performance of their contract, even at the instance of a stranger, and much more so at the suit of another set of assignees. Then, as the matter of the present petition is so entirely a matter in bankruptcy,—the petitioners, as well as the respondents, being assignees of two different bankrupts, and the property in question being bankruptcy property,—it follows, that all the parties concerned must

(a) The case alluded to by his Honor seems to be *Spurrier v. Handcock*, 4 Ves. 667. But the marginal abstract of that case is, "Specific performance refused, on the ground of laches and trifling conduct of the plaintiff; the contract being for a sale to the plaintiff, under a bankruptcy, of a reversionary interest for life, which in the interval fell into possession. The defendants (the assignees) having been also in some degree remiss, the bill was dismissed, without costs, upon delivering up the agreement."

(b) 3 Barn. & A. 123.

be within the jurisdiction of this Court. The proper course therefore for the petitioners to adopt was, to come to this Court, under the 75th section of the Bankrupt Act, and call upon the respondent assignees to accept, or reject, this lease,—and in the event of their accepting it, to abide by all the equities attaching to them by virtue of such acceptance. [*Erskine*, C. J. The difficulty in my mind is, whether this, or any other Court, can compel assignees to perform a contract entered into by the bankrupt, so far as to bind themselves personally by covenants arising out of that contract. Where assignees have been ordered to indorse a bill of exchange, for instance, the Court has always at the same time provided, that they should be protected and indemnified against personal responsibility (a).]

Sir G. Rose. I repeat, that it is a mistake to suppose we have any jurisdiction in this case. No case can be shown us, even occurring upon bill in equity, where assignees have been compelled specifically to perform a contract of this nature. This petition states, that *Slatter* alone agreed, on behalf of himself and the other assignees, to accept the lease in question. Now, can such an agreement be carried to the extent of binding the other assignees? The statute gives authority to this Court, it is true, to call upon the assignees to accept, or reject, the bankrupt's interest in any lease; and then the law gives a remedy against the assignees, if they elect to take the interest, in the shape of an action for use and occupation, or in an action of debt for the rent. But this Court can never, in the exercise of its discretion, compel a specific performance of an agreement by assignees, so as to

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(a) *Ex parte Moubray*, 1 Jac. & W. 448.

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fix them with a personal liability as to prospective covenants.

Mr. *Swanston* then intimated, that he desired to look into the different cases bearing on the subject, with a view to argue the point of jurisdiction, and that he should therefore wish the case to stand over.

The COURT conceded to his wish; and directed the case to stand over until after the term.

December 11.

The case came on again this day for hearing, when Mr. *Swanston* and Mr. *Stinton*, after recapitulating the facts, resumed the argument in support of the petition. There is no doubt, that there was a binding contract between the two bankrupts, *Oldham* and *Edge*; and the question is, whether the draft of the lease was conformable to the terms of that contract. [Sir G. *Rose*. There are two questions for our consideration:—1st. Whether the assignees of *Edge* ever agreed to take a lease; and 2d. Whether this Court has jurisdiction to decree a specific performance of the agreement.] It is quite clear, that bankruptcy does not defeat any agreement for a lease, which has been entered into by the bankrupt; and when the assignees take possession of the premises agreed to be demised, as they have done in this case, they are bound by all the liabilities of the bankrupt, the intended lessee. The facts here warrant us in saying, that the *assignees* have adopted the agreement; and it is immaterial for the argument, whether it is an agreement or a lease. A specific per-

formance may be decreed in equity against trustees, as well as against the *cestui que trust*. Then it becomes a question, whether this Court cannot administer justice in bankruptcy, by ordering assignees to do what the bankrupt had agreed to do. Here are two bankrupts, and two sets of assignees, and that is quite sufficient to give the Court jurisdiction. It is admitted, that before the passing of the Bankruptcy Court Act, there were various refined distinctions observed between proceedings in equity, and proceedings in bankruptcy. In the first place, the evidence was different, affidavits being used in the one, and interrogatories and depositions in the other. In the next place, there was no appeal in the one, but there was in the other; and there was, *lastly*, a more solemn judgment in the one proceeding, than the other. But since the establishment of this Court, the former objections do not apply, that were accustomed to be taken before the Lord Chancellor when sitting in bankruptcy. Not one of the reasons that used formerly to be urged, for transferring the jurisdiction in a matter of bankruptcy to a Court of Equity, has any bearing upon the present question; for a better mode of taking evidence has been introduced, by giving this Court a power of examining witnesses *vivâ voce*, and an appeal also lies from its jurisdiction. [Sir G. Rose. Supposing there were not sufficient assets here, how could you enforce your claim against the assignees? Or if an assignee had died, would you enforce the claim against his executors?] [Erskine, C. J. In the cases, where assignees have been held to be bound by taking possession of leasehold property, there is a distinction which would not apply to this case;—in those cases, they are only bound as

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assignees, while in possession of the property, and are relieved from all liability by assigning it to a stranger. But here you want to make the assignees personally liable. If you confine your petition to the adoption by the assignees of the agreement entered into by the bankrupt, by reason of their having taken possession of the property, then the Court has jurisdiction undoubtedly. But if you found your claim upon a fresh agreement made by the assignees since the bankruptcy, then it becomes a personal interest on the part of the assignees, and the question arises as to this Court having jurisdiction.] [Sir J. Cross. By the second section of the 1 & 2 Will. 4. c. 56. this Court is declared to “have power, jurisdiction, and authority to hear and determine, order, and allow, all such *matters in bankruptcy*, as now usually are, or lawfully may be, brought by petition, *or otherwise*, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy, *or elsewhere*.” This would seem to imply, that our jurisdiction is not confined to such matters in bankruptcy, as could only have been brought before the Lord Chancellor *by* petition; but that it extends to those matters in bankruptcy, which were *otherwise* brought before him.] That section, we contend, gives this Court jurisdiction over all matters in bankruptcy, not only over those which were formerly brought before the Lord Chancellor on petition, but over those which could only be brought before him by bill. Conceding the point, which we dispute,—namely, that this Court has only jurisdiction over such matters in bankruptcy, as were formerly brought before the Lord Chancellor on petition,—still assignees were held liable to account by petition in bankruptcy, and there

was no need to file a bill against them for this purpose. There was a case, indeed, decided by the Lord Chancellor (a), in which he said, that he had no jurisdiction over the representatives of a deceased assignee; but this was on account of the peculiar position, in which the parties stood. But, on the present occasion, it is no reason for the Court now renouncing the jurisdiction, because at some remote period a difficulty may arise as to the personal responsibility of the assignees.

In regard to the general jurisdiction in bankruptcy, which we ask the Court to exercise on this petition, we say, that the parties here are before the Court in the character of assignees, for acts done as assignees,—and that the Court is therefore competent to make the order as prayed for. This case is distinguishable from that of *Ex parte Warwick* (b), where,—on a petition by a lessor against the assignees of a bankrupt lessee, for payment of rent due after the bankruptcy, and for a compensation for hay and straw sold and carried off the premises by the assignees,—it was decided that the Court had no jurisdiction, unless the petitioner made out a case for an injunction. The grounds of the judgment in that case were, that the petitioner prayed for no relief to the lessor under the then statute of 49 Geo. 3. c. 121. c. 19.; and therefore the general rule applied, that the Court had only jurisdiction in disputes between the assignees and those who have come in under the commission. The petitioner in that case was considered a stranger to the commission; but the present case is not one between a stranger and assignees, but between two sets of assignees under different commissions, all of whom are

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therefore amenable to any order of this Court. In *Ex parte Fector* (a), it was decided by Lord Eldon, that the Lord Chancellor's jurisdiction, as to acts done in the bankruptcy, was not determined even by the superseding of the commission; for that a petition would lie on behalf of a purchaser of the estates put up to sale by the assignees, for the re-payment of the deposit. The purchaser of a bankrupt's property is not so much within the jurisdiction of this Court, as the bankrupt's assignees; and yet in *Ex parte Gould* (b), the purchaser of a bankrupt's mortgaged estate, sold before the Commissioners under the General Order, was, upon the petition of the mortgagee, ordered to complete his purchase. In *Ex parte Cowan* (c), where Lord Tenterden enters fully into the nature of the jurisdiction of the Lord Chancellor in bankruptcy, his lordship, in the conclusion of his judgment, says, that "the assignees are unquestionably subject to the control and jurisdiction of the Lord Chancellor sitting in bankruptcy, for all acts done by them in their character of assignees, by virtue or under colour of the commission." Then the language of the Bankruptcy Court Act, both in the preamble, as well as in the second section referred to by Sir J. Cross, appears to give full jurisdiction to the Court to entertain the present petition. The preamble, after reciting the 6 Geo. 4. c. 16., says, "It is expedient to provide means of administering and distributing the estate and effects of bankrupts, and of determining the questions, which from time to time arise touching the same, other than are provided by the said act." This would certainly imply that it was the intention of the act to provide other means of

(a) Buck, 428.

(b) 1 G. & J. 231.

(c) 3 B. & A. 123.

determining the questions relating to the bankrupt's property, than those which were formerly provided. The second section gives the Court full jurisdiction over all matters in bankruptcy. Then is not this a matter in bankruptcy, where the assignees of two different bankrupts are thus brought before the Court, for acts done by them in their character of assignees? The case of *Ex parte Tomkins* (a) shows, that assignees may be rendered personally liable. [*Erskine*, C. J. That case shows, only, that assignees must indemnify their own bankrupt's estate for their own misconduct.] There are many cases, however, in which assignees may be personally liable. In an action brought against an assignee, he cannot, like an executor, plead *plene administravit*, but he is liable whether there are assets or not.

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ERSKINE, C. J.—Would the Lord Chancellor formerly have had jurisdiction in bankruptcy, where a party purchased by private contract, to enforce the contract against the purchaser?

Sir G. ROSE.—In *Ex parte Gould* (b), the party was a purchaser under an Order of the Court for the sale of the property, and that gave the Court jurisdiction. There being two sets of assignees in this case does not, as it appears to me, bring the case more within our jurisdiction. The act of parliament which constitutes this Court, as I understand it, gives no jurisdiction beyond what the Lord Chancellor formerly possessed in bankruptcy. I find nothing in the act to extend it further. If that be so, and if the Lord Chancellor

(a) Sugd. V. & P. Append.

(b) 1 G. & J. 231.

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sitting in bankruptcy could not enforce this agreement, it follows that this Court could have no power to enforce it. I will merely ask any one conversant with the practice in bankruptcy, whether there was ever such a thing known as a petition to the Lord Chancellor, sitting in bankruptcy, against a stranger entering into a contract with the assignees, or even by one set of assignees against another. Has a contract against a purchaser been ever enforced, either before the Lord Chancellor, or in this Court, except where the purchase has been made under an Order of the Court? Then is this any thing more than a contract between two parties for the grant or purchase of a lease from one to the other? If the assignees of *Edge* were sued in any Court on this contract, they might dispute the bankruptcy of the other set of assignees. Have we then a power to prevent them from doing so? Besides, it is to be observed, that in the form of the proposed lease, as stated in the petition, there is a covenant not to assign without the licence of the lessor. Now can we compel the assignees to execute a lease containing a covenant not to assign, when they have a clear right at law to get rid of their liability?

Sir *J. Cross*. Suppose the bankrupt had entered into a contract for the sale of goods, which the assignees were obliged to fulfil. Is not that a similar case to this,—only that this is a contract to buy land, instead of goods?

Sir *G. Rose*. If it were a question of assets, then the Court would clearly have jurisdiction; but if it were nothing more than a contract entered into be-

tween two sets of assignees, then the Court would have no jurisdiction.

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Mr. *Spence*, and Mr. *Richards*, who appeared for the respondents, declined addressing the Court, as they could add nothing to what had been already said by Sir *G. Rose*.

Mr. *Swanston* was nevertheless heard, in the nature of a reply. The cases alluded to by Sir *G. Rose* are cases of executors, and not of assignees under a commission of bankruptcy. [Sir *G. Rose*. What I said with reference to the case of executors was this. If you ask us to order the assignees to execute a lease, and to be bound as far as the assets would extend, then we could do perhaps what you required. But if you ask us to compel the assignees to execute a lease, and enter into a covenant which will bind their executors, then you ask what the Court has no power whatever to do.] There are many acts required to be done by assignees, by which their executors are bound. If the doctrine is, as laid down by Sir *G. Rose*, then the Court would have no power to order assignees to do any thing which would affect their personal representatives. I contend, that the question now before the Court is a question relating to the administration of assets. Is the Court deprived of its jurisdiction over assignees, because an act is done, or contract entered into, by them subsequent to the bankruptcy? This was held very different in *Ex parte Cowan* (a). The question, as to any want of ability in the Court to deal with the personal representatives of assignees, ought

(a) 3 B. & A. 123.

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not to affect the principle, which should govern the Court in controlling the conduct of assignees, when they themselves are brought before the Court, and required to perform any engagement they have entered into relative to the bankrupt's estate or effects. In 1 *Deacon's Bankrupt Law*, p. 328, a case (a) is referred to, where the bankrupt had agreed to purchase a quantity of wool, and the assignees were held bound to perform the contract. If the bankrupt, in the present case, had been bound by the terms of a lease, the Court would have compelled the assignees to accept or reject it. Then, why is their jurisdiction to be curtailed, because the assignees have, since the bankruptcy, done an act amounting to an adoption of the contract, which the bankrupt entered into before his bankruptcy? It is not the duty of a judge, in administering justice, to narrow his jurisdiction;—on the contrary, *boni judicis est ampliare juris dictionem*. Before this Court was established, the Lord Chancellor could administer justice in bankruptcy in two ways, by petition, and by bill. Then what is there in the new act, which is to confine the jurisdiction of this Court to those cases, which the Lord Chancellor could decide only when brought before him on petition? What becomes of the words in the 2d section of the act, “all such matters in bankruptcy, as now usually are, or lawfully may be, brought by petition, or otherwise, before the Lord Chancellor.” It is evident, from these words, that those who framed the act were aware that the Lord Chancellor was in the habit of administering justice in bankruptcy, in other ways than by petition. [Sir G. Rose. The former practice before

(a) *Ex parte Gower*.

the Lord Chancellor was this:—In all cases before the commission was opened, the proper form of proceeding was by *motion*. The act, therefore, in using the words “or otherwise” alludes to that particular form of proceeding.] [Sir J. Cross. In the time of Lord *Hardwicke*, and of Lord Chancellor *King*, there were several matters in bankruptcy brought before the Court by bill, which might have been brought before it by petition. In this case, it really appears to me, that the subject-matter, as well as all the actors, relate to a *matter of bankruptcy*.] The construction, which I have been contending that the Court ought to put upon the act, is one of which it is clearly susceptible. It is difficult to conceive, why the Court should decline a jurisdiction, which the act has cast upon them; or what inconvenience can possibly ensue from this Court exercising the jurisdiction in the present instance, instead of sending the case to be dealt with by another tribunal.

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ERSKINE, C. J.—It is impossible to deny, that any question, which involves the extent of the jurisdiction of this Court, is one of considerable importance; it is important to suitors, to know what relief they can obtain by applying to the Court,—and it is important, also, when they do come here for relief, that they should not, if it can be avoided, be sent to a more expensive tribunal. In support of the prayer of the present petition, it has been contended that this Court has been given by the act which constitutes it a greater jurisdiction than what the Lord Chancellor previously possessed,—and that although the Lord Chancellor could not under the former system deal with certain matters, on petition, yet that the provisions of the

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recent statute enable this Court to do so. The 2d section of the act confers upon this Court, "the power, jurisdiction, and authority, to hear and determine, order, and allow all such matters in bankruptcy, as now usually are, or lawfully may be, brought by petition, *or otherwise*, before the Lord Chancellor;" and it has been contended, that because the words "*or otherwise*" are introduced into this section, the act intended to give us greater jurisdiction than what the Lord Chancellor was accustomed to exercise, when sitting in bankruptcy. But it appears, that the Lord Chancellor, sitting in bankruptcy, exercised jurisdiction *on motion*,—though seldom,—as well as on petition; and the words "by petition, *or otherwise*," may therefore not unreasonably be construed to refer to the form of proceeding *by motion*, as well as the form of proceeding *by petition*. It appears to me, then, that this clause in the statute does not extend our jurisdiction farther, than the Lord Chancellor's jurisdiction when sitting in bankruptcy. If we have not, therefore, more authority to grant the prayer of this petition, than what the Lord Chancellor possessed when sitting in bankruptcy, can we compel the assignees, in this case, to execute a lease, which the bankrupt had agreed to take, because they have adopted the contract since the bankruptcy, in the hopes of its proving beneficial to the estate? I think no Court would compel assignees to make themselves personally responsible by executing a lease, and entering into covenants with the lessor, to whom they would be always liable by privity of contract. In the ordinary case of assignees accepting a lease to which the bankrupt was entitled, they can always get rid of their liability by assigning to another person;

but here the assignees are called upon, not to accept, but to execute a lease, which would have the effect of rendering them permanently and personally liable to the covenants contained in it. It is said, that this is a stronger case for our interference, inasmuch as the assignees have, since the issuing of the commission, positively agreed to take this lease. But that circumstance does not, as it seems to me, advance the argument for the petitioners. An agreement entered into by assignees, since the bankruptcy, does not the more give jurisdiction to this Court. It is a mere personal contract, for which they are personally liable either in an action at law, or by bill in equity; but it is not in itself a matter of bankruptcy, nor one which the Lord Chancellor exercised jurisdiction over, either on petition, or on motion. Unless therefore we were to go the length of saying, that any person contracting in any mode with the assignees of a bankrupt could come to this Court for an order to enforce the contract, I think we cannot compel the performance of the contract in the present case. There is a distinction, which has been already noticed from the bench, between this case and that of *Ex parte Gould* (a); in that case, the purchase was made *under an order of the Court*, and it was on this ground, that the purchaser was brought within the jurisdiction in bankruptcy. Upon the whole, then, considering the present case as a question of contract between these two parties, I should say, that it is not a matter in bankruptcy, but merely a contract between a stranger to the commission and another party, who happens to be an assignee. As at present advised, therefore, I think that we have no

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(a) 1 G. & J. 231.

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jurisdiction to grant the prayer of this petition; and even if we had jurisdiction, it appears to me, that this is not a case which would call upon us to exercise it. But I wish to hear the opinions of my learned colleagues on the bench, before I pronounce my final judgment.

Sir J. CROSS.—It is satisfactory to me, that his Honor, the Chief Judge, has deferred giving his final judgment in this matter, until I have expressed my opinion; though I cannot but regret, that the counsel for the respondents should calculate upon a majority of the Court giving judgment in their favour, and decline to address any argument to the Court on behalf of their clients; when, by so doing, my doubts might have been removed, and I might have been brought to agree in opinion with my learned colleagues. However, as they have chosen to pursue this course, I am bound to express the opinion I entertain on the subject-matter of this petition. Now, what is the case before the Court? The two bankrupts, *Oldham*, whom the petitioners represent, and *Edge*, whom the respondents represent, were interested in the property mentioned in the petition,—the estates of the two bankrupts have become entangled and entwined together, and the object of the petition is to set all matters right, and make one set of assignees do justice to the other. The respondents, it appears, have taken possession of the property which was the subject of the agreement between the two bankrupts, and have kept it for two years, without fulfilling the contract entered into by *Edge*. I must own, that I cannot reconcile it with my duty to send these petitioners to the Court of

Chancery, oppressed as it is with business, for relief,—when this Court is fully enabled, as it appears to me, to adjudicate on their case, and one of the chief reasons for establishing this Court was the pressure of business in the Court of Chancery. I cannot, I repeat, send the suitor to the very place, from which it was the intention of the legislature that the jurisdiction should be removed, and tell him he cannot have justice done him by this Court. There is another consideration, too, which weighs with me on the present occasion. If we send these parties to the Court of Chancery, and our decision should be reversed by the Lord Chancellor, then it would be said by those who are seeking to disparage this Court, that we endeavoured to relieve ourselves from the duties imposed on us by the legislature, by sending every thing we could to be decided by another tribunal. I cannot agree, that before we exercise the jurisdiction and control which is especially given to us by the legislature in all matters of bankruptcy, we must refer to books of practice to tell us, that in certain cases we are not to exercise such jurisdiction and control. Books of practice, though useful guides on some occasions, are not incorporated in this act of parliament, and can, therefore, have no effect in limiting the jurisdiction which the statute gives us. Besides the general superintendence and control given by the second section of the act, there are other words superadded in that section, which have been already referred to; and I think we should look to the act itself, and not to books of practice, to explain what the power of this Court really is. From the best construction I can put upon the act, I think we are not confined to adjudicate on those cases, in which the Lord Chancellor had

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only jurisdiction, on *petition*; but that the intention of the legislature was to give this Court jurisdiction in every case, which concerned the interests of the bankrupt and his creditors. As the Court, however, do not mean at present to pronounce a final judgment, and I have the misfortune to differ with my colleagues in the view I now take of this question, I should wish to consider further my opinion, before we finally dispose of the case.

Sir G. ROSE.—I have already stated my opinion, and I have since heard nothing to shake it, that the power which was transferred by the act of parliament, from the Lord Chancellor to this Court, was nothing more, nor less, than the jurisdiction which the Lord Chancellor was accustomed to exercise, when sitting in bankruptcy. If every thing was to be decided by this Court, as contended for, which in any way related to, or concerned the estate or effects of the bankrupt, we should not only have the sole cognizance of all actions of trespass and trover, that are now brought in the Courts of Common Law, when the title of the assignees to the bankrupt's property is disputed by a plaintiff or defendant,—but also of various other questions, that are now usually decided by the Court of Exchequer.

ERSKINE, C. J.—If it is intended that the case should go further, after our final judgment is pronounced on it, I should wish the form of the proposed lease to be inserted in the special case to be carried before the Lord Chancellor, in the same way as it appears in the present petition; because that is most important for a right understanding of this case; the

question being, not only whether this Court has jurisdiction, but whether any Court would compel an assignee of a bankrupt to execute *such a lease*, containing *such a covenant* as is there set forth.

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It was arranged that the matter should stand over for the present, to give the parties an opportunity of coming to some agreement as to the terms of the lease, and that the question of costs should also be reserved.

This case was again mentioned to the Court this day.

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Mr. Swanston.—The Court have, as I understand, already in effect decided, that they will not compel the assignees of this bankrupt to accept the lease proposed to be granted to them, so far as to render themselves personally responsible for the covenants it contains. But I beg to add this one observation, namely, that wherever assignees do, in any instance, elect to take a lease, it follows that all the bankrupt's liabilities are transferred to them; and that they stand precisely in the same position, in which the bankrupt himself stood at the time of his bankruptcy. Neither the bankrupt's liabilities, nor the rights which he acquired under the lease, are destroyed by the assignees accepting it; otherwise, the property of a bankrupt lessor would be completely lost to him, as well as to his creditors. For if the assignees of the lessee, after electing to take the lease, are at liberty to reject it, the assignees of the lessor will lose all the benefit they might otherwise have derived, and there will be no one to whose responsibility they can resort.

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Sir J. CROSS.—The difficulty I have in this case is this,—and I wish particularly to call the attention of my colleagues to it, before final judgment is pronounced. Here are two sets of assignees, the one petitioners, and the other respondents; both claiming rights in one particular property, by the relation in which their respective bankrupts stood towards each other at the times of their respective bankruptcies. Their rights are still undefined; though, undoubtedly, they are altogether rights in bankruptcy. Both the petitioners and respondents are officers of this Court, over whom, as such, this Court has a peculiar jurisdiction. Both come here prepared to ask for the opinion of the Court upon their respective rights. In this state of circumstances, one of the judges of the Court, and not the counsel for either of the parties, starts the objection that there is no jurisdiction,—or, even admitting there is a jurisdiction, that it is merely in the discretion of the Court, and one which the Court ought not, in this case, to exercise. First, then, I wish to invite the attention of my colleagues to the question, whether in this state of circumstances the Court, *ex mero motu*, is bound to take up this objection, and by repudiating our own jurisdiction, to turn the parties back upon another tribunal, after they have, without any objection to the jurisdiction on their parts, appealed to us for our judgment, and been put to all the costs that must have been incurred on this petition.

I agree, that if it were quite clear that the Court had no jurisdiction,—as if a petition was presented to try before us a criminal matter,—the Court would be bound to say at once, “we have no jurisdiction.” But here, to say the least, the question of jurisdiction is very

doubtful; and I do not think the objection ought, in the first instance, to have fallen from the Court itself.

Secondly, I wish to submit to the consideration of the Court, that the effect of this objection, of want of jurisdiction, being to determine that the Court has no power to interfere between two sets of assignees, although the subject in dispute is clearly bankruptcy property,—we should not pronounce our final judgment on the point, without a thorough investigation of the merits, especially where the parties themselves have thought proper to submit to this course of proceeding (a).

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EASKINE, C. J.—I think my learned colleague takes too limited a view of this question; for even conceding that we have jurisdiction in this case, the subject for our further consideration is, whether we ought in our discretion to exercise it. First, whether we are to do so, by making assignees personally responsible for covenants, from the mere circumstance of their taking possession. And secondly, although the assignees have specifically contracted to take a lease, whether we have any power to compel the specific performance of their contract.

Sir G. ROSE.—I agree, that in all cases, where there is a questionable point of jurisdiction, the Court should struggle hard to exercise it, and give the benefit of it

(a) In *Attorney General v. Lord Hotham*, 8 Russ. 415, Lord Lyndhurst observed, that where a Court determines a matter not within its jurisdiction, its decision is a nullity. And in *Mittf. Plea.* p. 153, ed. 1827, it is said, that where the Court has no jurisdiction, no consent by the parties can give jurisdiction.

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to a party seeking justice at our hands, as far as we can. But I do not think, that in a case where the Court has unquestionably no jurisdiction, it should shut its eyes to the fact, and suffer a matter to proceed to a final determination on the merits, leading the parties perhaps in the end to much more expense and litigation, than by arresting the proceedings in the first instance. The present case has, from its commencement, struck me as one, which our jurisdiction does not in any way warrant us to intermeddle with; for who ever heard of a Court sitting in bankruptcy,—either with, or without, the addition of an equitable jurisdiction, entertaining a mere question of contract between two sets of assignees,—a contract, too, that was entered into by them, after their character of assignees attached—for the sole reason because the parties to the contract happened to be assignees? Can the mere circumstance of their being assignees give this Court jurisdiction over them, where, but for their bearing the name of assignees, no one would for a moment say the contract itself was a matter in bankruptcy?

Let us look how it would be necessary to state the facts of this case in pleading, either at law, or in equity. Here is a contract arising after, and, in my view of the case, independent of bankruptcy. Now would any pleader, let me ask, think it necessary to show the title of these parties as assignees, or even to mention that they were assignees at all, otherwise than as mere description? Their title and interest in this contract is not *quâ* assignees, but as mere individuals entering into an ordinary contract; and the only possible colour for our claiming jurisdiction over them is, that the subject-matter of the contract is bankrupt's property.

But, to refer to the words of the Bankrupt Act (*a*), what power do the 75th and 76th sections give us in a case of this description? What more, than merely to call on the assignees to determine, whether they will accept, or reject, this kind of property belonging to their bankrupt? This is all the power conferred on us by the act; for when the assignees *have accepted, or declined*, the lease, the Court has no longer jurisdiction (*b*). And so strictly have Courts sitting in bankruptcy followed the terms prescribed by the act, that they have invariably refused to allow a petitioner in this respect any costs (*c*).

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I beg it may be distinctly understood, that I have formed my opinion, not only on the subject of jurisdiction, but on the merits also. Looking at this case hypothetically, and conceding all the facts alleged in the petition, and considering the question as if it had been raised upon demurrer to the jurisdiction in a suit in equity, where all the facts are taken as admitted by the demurrer, I cannot see how we can entertain this petition. And I wish to try the question of jurisdiction by this test. Suppose we were to make an order on this petition, as prayed; that order could not affect the assignees, as assignees, but it would merely go to bind the present assignees, their heirs, executors, and administrators, without any reference to their character of assignees. If one assignee were removed, or were to die, and another were appointed in his stead, could our order in any way affect the newly-appointed one? Certainly not. It would only extend to the original parties, their heirs, executors, and administrators.

(*a*) 6 Geo. 4, c. 16.

(*b*) *Ex parte Clunes*, 1 Mad. 77.

(*c*) *Ex parte Bright*, 2 G. & J. 79.

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Then, again, admitting that we have the jurisdiction to entertain this petition, where is the evidence, or even any statement in the petition itself, that, in the exercise of our discretion, is to induce us to bind the *three* assignees? *Slatter* has, by the evidence before us, bound himself; but where is his authority to bind his co-assignees? where is the compliance with the statute of frauds? the memorandum signed by the agent duly authorized? or where is the part performance on their parts? In the absence of all these, I say, we are bound to dismiss this petition, merely in exercise of our discretion.

As to the costs in this case, there is always an anxiety in the Court to prevent the burthen of costs from falling wholly on one party, by ordering them to be paid by both parties to a petition. But where a petitioner wholly fails to establish a case on his own showing, after all the facts of his petition are conceded to him, what can we do but make him pay the costs? That, indeed, is the rule in all cases; but when we look narrowly into this petition, we shall find that the main object was not to benefit the estate of *Oldham*, the bankrupt, but a mere endeavour to give to the mortgagees a better security for their debt. In the lease proposed to be granted, they would, in fact, be the lessors, and the assignees of *Oldham* are their mere machines in presenting this petition. Under this view of the case, I am of opinion, that the petition must be dismissed with costs.

Sir *John Cross* wishing further time to consider his judgment, the case stood over for final judgment.

Cur. adv. vult.

ERSKINE, C. J., now delivered the judgment of the Court.

This was a petition by the assignees of *Thomas Oldham*, a bankrupt, praying that the assignees of *John Edge*, a bankrupt, might be directed to accept and execute a lease in the form set out in the petition,—or that it might be referred to the proper officer to settle such a lease as they ought to accept, regard being had to the agreement between the two bankrupts, also set out in the petition.

The agreement thus referred to bears date the 29th December 1829; it is signed by the two bankrupts, and is in these words(a). (His Honor, after reading the agreement, proceeded as follows.) The reference to the covenants, to be introduced into the lease, marks this instrument as a mere agreement, and shows that it was not intended to operate as a present demise. And accordingly it appears, by the statement in the petition, that *Edge* gave instructions to *Oldham's* solicitors to prepare a lease pursuant to the terms of the agreement, and that a draft lease was prepared accordingly, and sent to *Edge's* solicitors for approval. In the meantime *Edge* was let into possession of the premises under the agreement, and continued to occupy them down to the time of his bankruptcy; but no lease was ever executed.

On the 15th March 1831, a commission of bankrupt was issued against *Oldham*, under which the petitioners were appointed assignees. And on the 24th June following, *Edge* also became bankrupt, and the respondents, *Slatter*, *Jackson*, and *Boothman*, were appointed his assignees. It was further stated by the petitioners, that the assignees of *Edge*, immediately

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(a) See ante, p. 145.

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after his bankruptcy, entered into the possession of the premises; and that *Slatter*, as one of such assignees, has ever since carried on the bankrupt's business of calico printer upon the premises, for the benefit of *Edge's* estate; that *Boothman* had supplied the premises with coals; and that either the assignees, or *Slatter* on their behalf, had paid the rent mentioned in the agreement.

It will tend much to simplify the question in dispute, if, before I allude to the other circumstances stated in the petition, I stop here to consider what was the position occupied, and the responsibility incurred, by the assignees, under the facts already mentioned. By taking possession of the premises, they had clearly adopted *Edge's* tenancy. It is material, therefore, to ascertain what was *Edge's* situation at the time of his bankruptcy. At law, he was a mere tenant from year to year, upon the terms specified in the agreement; his assignees, therefore, having taken possession, would stand in the same relation to the landlord, and, as such, would be liable at law for the rent, and other consequences of such tenancy.

In equity, which considers what is contracted to be done, as done, *Edge* would stand as lessee for fourteen years, subject to be called upon to give a legal effect to his liability as such, by the acceptance and execution of a formal lease, according to the terms of the agreement. In equity, therefore, the respondent's relation to the lessor would be that of assignees of his lessee, involving them in the same responsibility that would have resulted from a lease actually granted to *Edge* before his bankruptcy, and adopted by them; in which case their liability to the payment of rent, and

the performance of the other covenants of the intended lease, would only endure so long as the property remained in their hands; and, upon a sale and assignment of the bankrupt's interest, they would be released from all further responsibility. The only reasonable application, therefore, against them as assignees in possession of premises thus situated, would be, to compel them to take the term contracted for, upon the same conditions as would have attached to them, if the lease had been actually executed before *Edge's* bankruptcy, and they had elected to adopt it.

But this application by the petitioners is of a very different character; and when it was distinctly asked of their counsel, whether they would be satisfied with an order that would bind the respondents to that extent, they as distinctly answered in the negative, and pressed for a lease, to the purport of the draft set out in the petition. By that draft the demise is proposed to be by the mortgagees, by the direction and appointment of *Oldham*, and his assignees, to the respondents, their *executors, administrators, and assigns*; thus rendering themselves, and their personal representatives, responsible for the fulfilment of all the covenants for the whole term of fourteen years, even after they should have sold the premises, as they are bound to do, for the benefit of *Edge's* creditors;—a proposal too unreasonable to be sanctioned by any Court.

But it was urged in the argument, that the respondents had expressly agreed to take a lease to themselves, upon their own personal responsibility; upon which two questions arise:—First, whether, assuming every allegation on the face of the petition to be true, any such agreement has been made out, in

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fact; and, secondly, if made out, whether this Court has the power to enforce it. I should very much question the jurisdiction of this Court to enforce the performance of any such agreement, if it had been established even by the clearest evidence; because the responsibility, thus incurred by the personal engagement of the respondents, seems to me a fitter subject for a bill in equity, than a petition in bankruptcy. But it is unnecessary to discuss this question further; because I am satisfied, that there is no allegation in the petition of any agreement, under which the respondents ought to be compelled, in any Court, to accept and execute any such lease as that suggested by the petitioners. The only statement pointing to such an agreement is, the allegation that *Slatter* represented that the assignees had determined to take the lease of the premises. What lease? does it necessarily follow, that a lease to the assignees, binding them personally to the covenants for the whole term, was intended? Is it not more reasonable to suppose, that a lease, commensurate with their interests and liabilities, as assignees, was all that was required? The landlord, indeed, might not be bound to grant any such lease, and might have put an end to their tenancy by a regular notice to quit, or might have applied to the Court under the provisions of the forty-sixth section of the Bankrupt Act. But suppose *Slatter* had expressly said that the assignees would take a lease to themselves, and personally bind themselves by the covenants, as lessees—where is the evidence that *Slatter* had authority thus to bind his co-assignees? There is no admission by them of their assent; nor is there any evidence of it. Possession was not taken under any such agreement;

for *Slatter* was already in the occupation of the premises; and there is no one fact stated in the petition, from which any inference of the assent of the other two assignees to any such arrangement can be fairly drawn. Assuming, therefore, for the Court the widest range of jurisdiction, and taking every fact stated in the petition to be true, there is no case established for calling on the respondents to accept such a lease as that now tendered. The petition must, therefore, be dismissed with costs.

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Sir J. Cross.—I have before delivered my opinion on the question of jurisdiction. But after a careful perusal of the petition, I think that, on the merits, the petitioner is not entitled to relief.

Sir G. Rose concurred, referring to his former judgment.

Petition dismissed with costs.

Ex parte JOHN REAY and others.—In the matter of
JOHN LEECH.

Southampton
Buildings,
March 2.

THIS was a petition to restore the proof of a debt on the proceedings, which had been expunged by the Commissioners, under the following circumstances:—

The bankrupt had carried on an extensive business as a licensed victualler and tavern-keeper on Ludgate Hill, London; and the petitioners, who were wine merchants, had considerable dealings with him in the way of supplying him with wines, from August 1830 down

The bankrupt, who was a tavern-keeper, had bought of the petitioners large quantities of wines lying in the Docks, which were sold to him by sample, for stipulated prices, and at long credit, and for which the peti-

tioners delivered to him the usual transfer warrants. The assignees sold the wines by auction at a considerable loss; in consequence of which the Commissioner made a reduction in the petitioners' proof, on the ground that the prices charged for the wines were too high:—*Held*, that he was not justified in making such reduction.

The costs of the petitioner, under these circumstances, were ordered to be paid out of the estate (a).

(a) See *Ex parte Waterhouse*, ante, p. 108.

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to the time of his bankruptcy, which took place on the 22d of December 1831. The petitioners alleged, that previous to the purchase of the wines, the bankrupt either tasted them by samples, or had orders for that purpose at the London or St. Katherine's Docks; and that he bargained for the prices and credits upon the same respectively. The petitioners had also, for the accommodation of the bankrupt, discounted the bankrupt's acceptances, and other bills of which he was the drawer, charging him with the legal discount thereon; which, they alleged, was a common practice with extensive dealers in the wine trade, who were desirous of affording accommodation to their customers; but the sales of wine and the discount transactions were separate and distinct, and not in any way mixed up with each other. The petitioners furnished the bankrupt with regular bills of parcels, together with warrants for the transfer of the wines at the docks, and drew bills upon the bankrupt for the amount of the price at which they were sold.

In November 1831, the bankrupt applied to the petitioners for a large parcel of wines, and agreed with them for the purchase of fourteen butts and twenty-two hogsheads of sherry, at 62*l.* per butt, making 1550*l.*; ninety-seven pipes, nine hogsheads, and ten quarter casks of port, at 52*l.* per pipe, making 5408*l.*, which, after deducting an allowance of 33*l.* 18*s.* 3*d.* for small gauge, made a total sum of 6924*l.* 1*s.* 9*d.*, which was to be paid by bills drawn by the petitioners on the bankrupt at twenty-four months, twenty-seventh months, thirty months, thirty-three months, and thirty-six months, in equal instalments. Before this purchase, however, the bankrupt was indebted to the petitioners, as they alleged, in the

sum of 5516*l.* 8*s.* 8*d.* for wines previously sold, for which he had given them his acceptances not then due; and also in the further sum of 4700*l.* for discounting bills for him; to secure which sums, the bankrupt had, on the 16th November 1831, given the petitioners his bond. On the 25th November the bankrupt purchased four butts and ten hogsheads of sherry, at 62*l.* per butt, making 558*l.*; and eleven pipes of East India Madeira, at 76*l.* per pipe, making, after deduction for allowance, 836*l.*, which were sold at the same credit as on the former purchase. On the 30th November the bankrupt paid to the petitioners five bills accepted by him for 1000*l.* each, which were drawn on him by *Thomas Champion and Son*, when his five acceptances, which he had given the petitioners for the 6924*l.* 1*s.* 9*d.*, were cancelled. But the delivery of these five bills was in no way to alter the contract for credit made on the 18th November, the petitioners having agreed to renew these bills as they fell due. The petitioners alleged, that they had themselves purchased the eleven pipes of Madeira on the 4th June preceding, at 60*l.* per pipe,—and the four butts and ten hogsheads of sherry on the 11th July previous, at 45*l.* per butt, cash price.

It appeared, that these wines so purchased by the bankrupt were, on the 5th July 1832, sold by the assignees by auction at a very great loss; but the petitioners alleged, that this was occasioned by the disadvantageous season of the year, the dulness of the wine market, and the large quantities sold by auction at one time; and they stated that when sales of wine by public auction are advertised and known as the property of a bankrupt's estate, they do not produce, upon

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the average, within 25*l.* to 30*l.* per cent. of the original cost, and that they had known numerous instances of a loss of 40*l.* per cent.

The petitioners stated, that they were the most extensive dealers in foreign wines in the United Kingdom—that the interest of their capital was 5500*l.* per annum—their annual loss by bad debts 5000*l.*—that the expenses of their counting-house establishment and rent of vaults at the docks, &c. amounted to 5655*l.* per annum. And they averred that, after a minute and accurate estimate of the actual cost of the wines, the rate of profit arising to them did not, on the average, exceed 9*l.* 10*s.* per cent. per annum.

The petitioners proved under the commission, on the 9th January 1833, for the sum of 8608*l.* 10*s.* 7*d.*; but the Commissioner afterwards made a considerable reduction in the proof, on the ground that the prices charged for the wines were too high.

The petitioners therefore prayed, that the decision of the Commissioners might be reversed, and that the petitioners might be declared entitled to prove for the said sum of 8608*l.* 10*s.* 7*d.*, and that their proof might be restored.

Mr. *Twiss*, and Mr. *G. Richards*, for the petitioners. The Commissioner had no power in this case to reduce the proof, by deducting the excess of the profit made by the petitioners. We stand upon a contract made between seller and buyer, and taken to by the assignees. They saw the invoices, and knew the prices; yet they never complained of them, or returned any of the wines; but, on the contrary, they took all the bankrupt's stock, and sold it. When an action is brought

for goods sold at a given price, there can be no defence that the goods proved to be of an inferior quality.

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Sir G. ROSE.—The best way of trying the contract is, to ask the assignees, whether they will return the vines to the petitioners.

Mr. Swanston, and Mr. Bethell, for the assignees. The transactions between the petitioners and the bankrupt in this case were of such a nature, as to authorize the Court in modifying the contract; for if the price put upon the goods was an exorbitant and unreasonable one, it is then fraudulent against the rest of the bankrupt's creditors; and even a court of law would, either in an action for the price, or a cross-action by the purchaser, make such a deduction from the price as would be just and reasonable. Thus, where a plaintiff declared on a *quantum meruit* for work and labour done, and materials found, it was held that the defendant might reduce the damages, by showing that the work was improperly done, and might entitle himself to a verdict, by showing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed. *Farnsworth v. Garrard* (a). So where a bill was given by a defendant for the price of goods sold, and the sum for which the bill was given was infinitely beyond the real value of the goods, Lord Ellenborough held that the plaintiff could not recover upon the bill; *Fleming v. Simpson* (b). [*Erskine*, C. J. In that case the contract was for wine of a particular quality, and the seller delivered wine of a very inferior quality.] The principle, however, that a purchaser

(a) 1 Camp. 38.

(b) 1 Camp. 40, (note).

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might, in an action for the price of goods sold, object to the quality of the goods, either in bar of the action, or in reduction of damages, was recognised in a subsequent case of *Fisher v. Samuda* (a). So, where a contract is even for work to be done at a certain price, it is competent to a defendant to prove that the work done was not worth so much as the plaintiff claims, if he give the plaintiff previous notice of such defence; *Bastin v. Butter* (b). But if in an action against the purchaser of goods, the exorbitancy of the price will be no defence, it will at all events give a right of cross-action to the purchaser against the seller; *Tye v. Gwynne* (c). According to the proof of these petitioners, as it stood upon the proceedings, the credit given by them was thirteen months, and they now make a new case of having given thirty-six months credit, to justify the exorbitant price charged by them; *Reay* having stated before the Commissioner, that the price charged was proportionate to the length of credit. But that contract was varied afterwards, by his taking security for thirteen months only; and the longer bills were given up by *Reay* for short ones. He now says, that the bills were given on a contract for renewal; but this was never stated before the Commissioner. We have therefore a right to say, that the prices of the wines must be reduced accordingly. [*Erskine*, C. J. That will be only a question, whether there shall be a rebate of interest upon the amount of the proof, when the dividends are paid. It will not affect the amount of the proof.] In the next place, we contend, that the transaction in this case is impeachable on the ground of usury; the sale of the wines to *Leech* being virtually a loan.

(a) 1 Camp. 190.

(b) 7 East, 479.

(c) 2 Camp. 346.

Mr. *Twiss* objected to this point being raised on the argument, as it was never taken before the Commissioner.

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ERSKINE, C. J.—The objection on the ground of usury would go to the whole of the debt; and there is no appeal against the judgment of the Commissioner, on the ground of usury.

Sir G. ROSE.—If you can establish usury, you may present a cross petition; but that is quite a distinct issue.

Mr. *Swanston*, and Mr. *Bethell*, in continuation. We do not mean to appeal against the judgment of the Commissioner on this point; but we contend that we have a right on the present occasion to make any defence, to show why the petition should not be dismissed. [*Erskine*, C. J. The Commissioner was wrong in saying, that in every action for goods sold and delivered, the value of the goods can be taken into consideration; this is certainly not the case where the contract is for a stipulated sum.] Here is an opulent house dealing with a distressed trader on the eve of bankruptcy, selling him 100 pipes of wine at a time, not for consumption, but on which the trader raises money. The charge of the petitioners for wine sold the bankrupt, since December 1830, amounts to 25,434*l.*, for which they received the bankrupt's bills and acceptances to the amount of 22,157*l.* Part of the present demand, it appears, is for 6924*l.*; for wines sold the bankrupt at one sale only six weeks before his bankruptcy. That the wines previously sold were not intended for consumption, is sufficiently proved by this circumstance,—that many of them were in the London

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Docks at the time of *Lerch's* bankruptcy, and the petitioners actually charged him rent for the pipes laying there. This, therefore, is not a *bonâ fide* transaction in the ordinary course of trade; and the inference is, either that the transaction is usurious, or that it is an undue advantage taken by one man of the necessities of another. In the course of the investigation, also, which took place before the Commissioner, it was deposed by a witness, that *Reay* himself acknowledged that his first acquaintance with the bankrupt proceeded from the bankrupt coming to ask him to lend him money; when *Reay* said, he could not lend him money, but that he would supply him with wine.

In bankruptcy, the Commissioners have power to reject or reduce the proof, upon equitable grounds; although the same might not give a right of action to the bankrupt, or be a good defence to an action by the seller. [Sir G. Rose. If you have a good defence to an action, or a ground for an injunction, then you may reduce the proof; but the right to bring a cross-action will not support your argument. If you have a right of cross-action against the seller, you may bring such action, and the Court will stay the dividends till the action is determined.] The measure of the proof of a creditor, under a commission of bankruptcy, is the measure of the demand which the creditor could, in justice and equity, eventually establish against the bankrupt.

Mr. Twiss, in reply, was stopped by the Court.

ERSKINE, C. J.—If the Court could have sustained the question, whether the Commissioner has come to

the right amount in calculating the value of the goods, then the argument of the counsel for the respondents, as to the reduction of the price of the wines, might have been material; for the petitioners at one time state that the wines were sold at three years credit, and another time at thirteen months. But the circumstance of the time, for which credit was given, can be only brought in as a measure of reduction. And as it appears to me, that the Commissioner had no right to make any reduction, it is unnecessary to go into the question, whether the credit was for thirteen months, or what, in fact, was the specific credit. The Commissioner would, no doubt, have been justified in dealing with this proof, as a jury would in an action by the petitioners upon the contract for the sale of the wines. But then the question is, what that contract was. Now it appears, that the contract in this case was for a sale of the wines at a stipulated price,—not upon a general contract of *quantum valebant*. Would it have been competent to the bankrupt, in an action brought against him by *Reay & Co.*, to say, when I bought the wine, I thought it was worth the money I agreed to give for it,—but now I find it is not worth that sum? For if he could urge that as a defence, in the present instance, he might equally do so in an action for the price of a horse; and the principle of *caveat emptor* would be quite exploded from the law of vendors and purchasers. If the same wines, indeed, as those contracted for, had not been delivered to the bankrupt, then the case would have been different. But no complaint here has been made of the *quality* of the wines, either by the bankrupt, or the assignees. The Commissioner adopts the contract, as to the quantity and quality of the wines, but leaves

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it open as to the price; in doing which, I think, he acted erroneously. For I take it to be clear, where an action at law can be maintained by a party, for a given sum contracted to be paid to him for the price of goods sold, and a Court of Equity would not restrain the execution on the judgment in such action, that a creditor of this description can prove for the amount in bankruptcy. But then it is said, that the petitioners in this case have been guilty of a fraud, in respect of which the bankrupt, or his assignees, might bring a cross-action against the petitioners. But for what? If *Reay & Co.* had contracted to deliver wines of a particular quality, and had failed in the performance of their contract, then the assignees could, no doubt, have recovered damages against them in a cross-action for their breach of contract. But it has never been pretended in this case, that the wines were deficient, either in quality, or quantity. In the absence of any deceit or fraud practised by the seller of goods, and where there is a stipulated price agreed to be paid for them by the purchaser, I think the creditor may prove for the amount of the price, without regard being had to whether the price was a high, or a low one. I am therefore of opinion, that the Commissioner was mistaken in his judgment on the present occasion, and that the proof of the petitioners must be restored.

Sir J. Cross.—The respect I entertain for the opinion of the learned Commissioner, who adjudicated on this case, induced me to suppose that the contract here was an open contract on a *quantum valebat*; which would have then made all the difference in determining the question. But there having been, in fact, a

bargain for a particular price on the sale of the goods, and there being no imputation of fraud in the transaction, the bargain is the best criterion for settling the value. The Commissioner was mistaken in thinking that it would have been competent to a jury, and therefore to him, to inquire into the reasonable value of the wines that were sold, and to make a proportionate reduction from the price agreed to be paid for them. If such a principle was acted upon in Courts of Justice, it would lead to infinite inconvenience. In matters of trade, a bargain is the mode of earning the profit by which a dealer lives. Both buyer and seller here had a perfect knowledge of the value of the article dealt in; and a trader, who sells a commodity under these circumstances, has a right to make the best bargain he can for himself; a Court of Justice having no right to rescind the contract, unless in the case of fraud. Now the only fraud that is even pretended to have been practised in this case, is the high price for which Messrs. *Reay* & Co. contracted to sell their wines. But in what does fraud consist in transactions of this description? I have always understood it to be, where something is concerted on the part of the seller, and something *ex post facto* discovered on the part of the buyer. There is nothing of the kind here. We therefore cannot undo the bargain, which these parties have entered into with their eyes open; nor suffer the proof of the petitioners to be reduced, merely because the assignees allege that too high a price was agreed to be paid by the bankrupt for the wines.

1833.

Ex parte
REAY
and others.

Sir G. ROSE.—It is difficult to arrive at the same conclusion, which the Commissioner has presented to our

1833.

Ex parte
Reay
and others.

minds, in deciding upon this proof. If there be an express price agreed upon between two parties on the sale of goods, and the contract is executed by the delivery of the goods, the amount of the price then becomes a debt due to the vendor, and the property vests in the vendee. I consider this proposition, also, as not to be controverted, namely, that what would be a good defence at law, in an action for the recovery of the debt, would be equally receivable in rejection or reduction of the proof. If the goods sold are represented to be what they are not,—or if any fraud has been practised by the seller or the buyer,—then this would go perhaps to defeat the action of the vendor, and would also furnish a ground of objection to the proof. But it is unnecessary to dwell upon that argument in this case; for fraud is altogether out of the question. Then, with regard to the cross-action, which it has been contended would lie by the assignees against the petitioners,—in what manner could such an action be supported, in the absence of any warranty of the seller, or any damage sustained by the buyer? As the assignees, however, might, or might not, succeed in the action, the only course for this Court to adopt, even if such an action was brought, would be to order the dividends to be stayed upon the proof, until the action should be disposed of. It has been gravely put here by the counsel for the assignees, that this was a catching bargain between a tavern-keeper on the one hand, and a wine-merchant on the other. But there is no ground of equity in this case, to support a bill for an injunction to restrain the petitioners from proceeding at law against the bankrupt, if they had thought proper to do so, and bankruptcy had not intervened.

And therefore it appears to me, that the original proof of the petitioners ought to be restored; and that the petitioners ought to have their costs out of the estate.

1883.

Ex parte
RAY
and others.

Mr. *Swanston*, and Mr. *Bethell*, submitted that the petitioners ought not to have their costs out of the estate; and that the same rule, which was acted upon in the case of *Ex parte Waterhouse* (a), applied with equal force in this; namely, that a party was not entitled to costs on a petition, although the judgment of the Commissioners against him proves to be erroneous. The like practice prevails in the Court of Chancery, on appeals from the Master's decision; where costs are never given to a party, merely because the Master's decision is reversed. The only exception to this rule is, where the Commissioners have rejected the proof *in limine*; but not when he has gone into the facts, and come to a deliberate judgment.

ERSKINE, C. J.—The distinction in this case is, that the proof here was, in the first instance, in favour of the petitioners. That, therefore, was the original decision of the Commissioner. And I think we should deal with the present case in the same way, as if it was a petition by the assignees to reduce the proof.

Sir J. CROSS.—The legislature has given the Court a discretionary power as to the costs (b); and the Court,

(a) See *ante*, p. 108.

(b) By 1 & 2 W. 4. c. 56. s. 5. all costs of suit between party and party in the Court of Review shall be in the discretion of the Court, and shall be taxed by one of the Masters of the Court of Chancery. But by the subsequent act of 3 & 4 W. 4. c. 47. the Court of Review may order the taxation to be by one of the Registrars, or Deputy Registrars, of the Court of Bankruptcy.


1833.

Ex parte
REAY
and others.

in the case referred to, laid down no general rule on the subject. Here, both parties are interested in one common fund; and the petitioners will, therefore, have to bear their proportion of the costs incurred by the assignees in opposing this petition.

Sir G. Rose.—The general rule of not giving costs to a party, against the judgment of the Commissioners, must depend on the circumstances of each particular case. The case of *Ex parte Waterhouse* does not apply to this. That was a question between two bankrupts' estates, where there was a stated account, which might, or might not, prevent there being any proof at all. The Court thought it right, in that case, that each estate should bear the burthen of costs. But here the Commissioner admitted the proof in the first instance; and afterwards, acting under the new jurisdiction given to Commissioners to open a proof, caused it to be reduced. Of all the creditors under this commission, the assignees ought not to have struggled against the costs.

The Order was made, therefore, according to the prayer of the petition. The costs of all parties, as well of this petition, as of the proceedings before the Commissioner, to be paid out of the estate.



Ex parte BINNS.—In the matter of BINNS.

1833.

MR. TEMPLE, in the early part of the sitting of the Court, applied for time to answer affidavits, which had been only filed the day before yesterday, in a case where the parties lived at Manchester; the petition standing at the bottom of the paper of the day.

Southampton
Buildings,
March 2.

Notice must be given of a motion for time to answer affidavits, unless the motion is made when the petition is called on.

The COURT said, they could not make the order now, unless he had given notice of the application to the other party; and that if no such notice had been given, the application must be deferred, until the Court came to the petition in the paper (a).

(a) And see *Ex parte Grazebrook*, post, 199. The same determination was also come to in *Ex parte Steel*, May 30, 1834, in which Mr. E. Chitty moved.

Ex parte GOUGH.—In the matter of WYATT.

Westminster,
June 12.

THIS was a petition, under the 6 Geo. 4. c. 16. s. 48., for the payment of six months wages due to the petitioner as clerk (b). The fiat was issued against the bankrupt, as an architect and builder. The petitioner was a yearly clerk at a salary of 104*l.* per annum; and, on application to Mr. Commissioner *Merivale*, his claim for six months wages had been disallowed.

A clerk, who has served the bankrupt more than six months, is entitled to the allowance of six months' wages, although the bankrupt was not, in fact, a trader within the bankrupt laws, for more than two months out of the six.

Mr. *Montagu* appeared in support of the petition.

Mr. *Swanston*, for the assignees, objected, that as the petitioner had been engaged as clerk to the bankrupt in the profession of an architect merely,—the bankrupt having commenced the business of a builder only two

(b) See *Ex parte Humphreys*. ante, p. 114.

1838,

Ex parte
Gough.

months before the commission,—and that as an architect was not a trader, within the meaning of the bankrupt laws,—the petitioner could not be considered as entitled to six months wages, under this statute, which applied to wages only becoming due during the trading of the bankrupt.

The COURT said, that the act was imperative. The simple question was, whether the petitioner was a clerk. The bankrupt at the time of the commission was a trader, and no limitation of time as to his being so was provided by the act. The petitioner, therefore, being at the time of the commission a clerk to a trader becoming bankrupt, was entitled to the reasonable benefit given by the statute to that class of persons.

It was therefore ordered as prayed, the costs to be paid out of the estate.

Ex parte SHEPPARD.—In the matter of BULMAN and another.

Westminster,
June 12.

An application to consolidate the joint and separate estates will not be granted, if one creditor dissents.

MR. SWANSTON, and Mr. Anderdon, applied upon this petition to consolidate the joint and separate estates of the bankrupts, and relied on *Ex parte Part (a)*, which, they said, differed from the present case only in the circumstance of one creditor dissenting from the arrangement.

Mr. Spence appeared for the dissenting creditor.

(a) 2 Dea. & Chit. 1.

The Court thought that the dissent of one creditor was a fatal objection to the application. Where the Court consolidated two estates, against the dissent of a creditor, it was only because an order to keep distinct accounts could not, from the nature of the transactions, be complied with. But where the accounts can be kept distinct, then any creditor has a right to dissent, and the Court has no power to divert the course of payment of the creditors from that mode which the law has pointed out, namely, by applying the separate estate to the separate creditors, and the joint estate to the joint creditors; otherwise, it would be like taking a man's money from his pocket, when he did not choose to part with it.

1833.

Ex parte
SHEPPARD.

Ex parte WILLIAM KNOWLSON and others.—In the matter of WILLIAM KNOWLSON and others.

Westminster,
June 12.

THIS was a petition by the bankrupts to supersede the commission, on the consent of creditors. In 1830 the petitioners and a Mr. *Walker* carried on business as drapers, and also a separate business as grocers, and a joint commission of bankruptcy issued against the petitioners in November 1831. In December following a separate commission issued against one of the petitioners. All the bankrupts had surrendered, except two; one of whom it was stated, though it did not appear to the Court upon affidavit, was unable to attend and surrender himself, through severe illness.

A petition to supersede a joint commission, on consent of creditors, cannot be entertained as to any one of the bankrupts, who has not surrendered.

Mr. *Swanston*, in support of the petition, said, he

1833.

Ex parte
KNOWLSON
and others.

was aware that an objection might be raised that the Court could not supersede, as to those bankrupts who had not surrendered. But it is difficult to understand, on what grounds it is so absolutely necessary that a party should surrender, before his commission can be superseded ; thereby compelling him to incur, perhaps, very considerable expense and delay, in many cases where it is obvious that the very next moment the commission will be declared a nullity. Although formerly bankruptcy was viewed as a criminal process, yet of late years it has always been considered rather as a private remedy for creditors, than a public proceeding against a criminal. In *Ex parte Glynn (a)*, Lord *Lyndhurst* thought, that upon consent of creditors the *superseas* might go without surrender.

ERSKINE, C. J.—*Ex parte Glynn* I hardly consider as a sufficient authority to guide us, in a measure of so much importance as to its results. In that case there are none of the facts stated, and there are abundant authorities the other way. In *Ex parte Gilpin (b)*, notwithstanding all the creditors had been paid off in full, yet it was thought requisite that a renewed commission should be issued, for the mere purpose of taking the bankrupt's surrender, with a view to a *superseas*. We cannot therefore, in the present case, supersede as to those bankrupts, who have not yet surrendered. For, those bankrupts having committed a breach of a positive law, we should otherwise be compromising that, which the legislature has declared a felony. Besides which, the parties are, to say the least of their conduct, guilty of a contempt of Court. I therefore

(a) 1 Mont. 124.

(b) 1 Mont. 207.

think, that we are bound to abide by the general rule (a).

1833.

Ex parte
KNOWLSON
and others.

Sir J. CROSS.—I am always anxious, in the exercise of a sound discretion, to prevent too strict an adherence to technical rules from working injustice, rather than justice. But in a case, like the present, I cannot see any ground on which the general long-established rule should be departed from. Here the parties have, *primâ facie*, been guilty of contempt and felony, by their non-surrender, and are, in fact, at this present moment outlaws. If their non-surrender, indeed, has occurred through mere inadvertence or unavoidable accident, then the Court would, on a proper application made by them, give them an opportunity of surrendering, although the time has expired for doing so. But, as far as at present appears, their conduct is wilful, and we cannot exempt them from the operation of the strict rules of law.

Sir G. ROSE concurred.

The COURT, therefore, refused to supersede as to those who had not surrendered; but allowed the *superseas* to go, as to those who had duly conformed themselves.

(a) See *Ex parte Drake*, 2 Deac. & Ch. 91; *Ex parte Clark*, id. 194.

1833.

Ex parte ELIZABETH COLTON.—In the matter of JOHN
HIRST.

Westminster,
June 12.

Where a creditor delayed proving her debt until after a dividend had been declared, having relied upon the promise of the assignee to inform her of the progress of the commission, which he failed to do,—an order was made that the creditor might prove her debt within a month, and that the payment of the dividend should be, in the mean time, suspended.

IN this case the commission issued in November 1831. The petitioner was the executrix and sole personal representative of *William Colton*, her husband, and lived at Scawby, in Lincolnshire, about forty miles from Leeds. The bankrupt was, at the date of the commission, indebted to the petitioner in the sum of 2265*l.* 6*s.* 8*d.* for money had and received by the bankrupt for the use of *William Colton*; for part of which sum the bankrupt had given a bill of exchange, dated 29th September 1832, drawn by the bankrupt in the name of *James Hirst* and Sons, upon *J. Denison* and Co., payable at two months after date to *William Colton*, or order, for the sum of 200*l.* This bill was dishonoured, on being presented for acceptance. Immediately after the bankruptcy of *John Hirst*, the petitioner employed an agent to go to Leeds, for the purpose of investigating the accounts of the bankrupt with her deceased husband, *William Colton*, and with herself; and it appeared on such investigation, that the bankrupt had, a few days only prior to the issuing of the commission, sold a considerable quantity of corn, which had been consigned to him by *William Colton* for sale,—and that the petitioner being advised that she was entitled to receive the full amount of the produce of such sale, had delayed proving her debt under the commission. The provisional assignee promised to communicate with the petitioner's agent, from time to time, on the subject of the proceedings under the commission; and he accordingly informed her agent of the names of

the persons, who were chosen assignees of the bankrupt's estate and effects. A dividend was declared under the commission on the 17th May 1833, which was ordered to be paid on the 29th May; but the petitioner never saw any advertisement of a meeting for declaring such dividend, nor ever heard or knew that a dividend was about to be declared; and assigned this reason for omitting to prove her debt.

1833.

Ex parte
COLTON.

The petitioner, therefore, prayed that the assignees might be ordered to retain in their hands a sufficient sum out of the estate and effects of the bankrupt, to pay the amount of the dividend declared to the petitioner in respect of her debt, without prejudice to the payment of the residue to the creditors, and without prejudice also to the question, whether she was entitled to such, or to any dividend.

It appeared, however, from the case made out by the assignees, that the meeting for proof of debts was advertised not only in the Gazette, but also in the Leeds newspapers; and that upon the dividend being declared, the assignees, on the 18th May 1833, caused another advertisement to be inserted, announcing that fact; upon which the petitioner's solicitor wrote the following letter to *Nicholson* and *Barr*, the solicitors for the assignees.

“ *Re Hirst*, a bankrupt.

“ We are somewhat surprised to learn that a dividend has been declared in this matter, without any communication with Mrs. *Colton*, who was well known to the assignee to be a creditor to a large amount, and whose debt has been a subject of investigation between her agent and the bankrupt. We presume, however, that a sufficient sum is retained to pay the dividend on

1833.
—
Ex parte
COLTON.

her debt of 2265*l.* 6*s.* 8*d.*; and we shall feel obliged by your informing us on the subject by return of post, for our guidance, should further steps be necessary on the part of Mrs. Colton. You will have the goodness to communicate the contents of this letter to the assignees without delay, as we find the dividend is not proposed to be paid before the 29th inst. We are, &c.

Nicholson and Hett."

To this letter the following reply was sent:—

" We regret to say that this dividend is declared, and no reservation made for your client, of whose debt we never had the slightest idea until after the dividend had been declared, when we heard an inquiry made whether such proof had been received. There is not the slightest chance of realizing, out of the future debts and assets, any thing like what will pay your client a dividend equal to the dividend just declared. And whatever course you may advise your client to pursue on the subject, you will see the necessity of it being done immediately. We are, &c.

Nicholson and Barr."

The petitioner immediately gave the assignees notice of her claim, and notice not to pay any dividend until she had made her intended application to the Court; and the assignees accordingly suspended the payment of the dividends.

Mr. *Wright* appeared in support of the petition.

Mr. *Ching*, on behalf of the assignees, contended, that as soon as the dividend was declared, the fund ceased to be the bankrupt's, and the assignees had no longer any control over it. The creditors immediately


acquired an absolute right to have their respective dividends paid to them. The words of the 6 *Geo.* 4. c. 16. s. 107. are peremptory upon the assignees; and the Court has no power to countermand the order for the dividend, nor to deprive the creditors, who have proved, of their vested rights. Besides, it would open the door to great delay and laches on the part of creditors, and be setting a very bad precedent.

1833.

Ex parte
COLTON.

The COURT, however, ordered, that the petitioner should be at liberty to go in before the Commissioners and make such proof, or enter such claim as she was able within a month, the petitioner paying the costs and expenses of the application, and of any special meeting for tendering such proof. And it was further directed, that if the dividends should be remodelled, then the petitioner was to pay the costs consequent thereon, and that the payment of the dividend already declared should, in the meantime, be suspended.

The Court observed, that in all similar cases the same course had been adopted to restrain the payment of dividends, though not to disturb dividends already paid. And they added, that as the petitioner in this case had been lulled to sleep by the promise of the assignee to inform her of the progress of the commission, it would be very hard to visit her with the consequences of his neglect; and that there was no great danger of this case being made a precedent, since a creditor could derive no benefit by delay, and would, in all cases, be put to very considerable costs for special meetings and otherwise.



1833.

Westminster,
November 2.

Where a creditor gave a power of attorney in general terms, but without any express power to consent to a *supersedeas*, and the signature of the creditor himself to such consent was easily attainable:—*Held*, that his own signature ought to be procured.

In the matter of SAMPSON and REECE.

THIS was a petition to supersede the commission, upon the consent of all the creditors. The bankrupt was dead. The signature of one of the creditors was subscribed under a power of attorney, which was in general terms, and contained no express power to consent to a *supersedeas*. Some of the real estate had been sold under the bankruptcy; and the creditor, who executed the power of attorney, was now in the way, and could himself sign the consent to supersede.

Mr. *Swanston* appeared in support of the petition.

The COURT thought the power was not sufficient, and that the signature of the creditor himself should be obtained. The petition was therefore ordered to stand over, and the purchasers of the real estate were directed to be served with the petition.

Ex parte LEWIS.—In the matter of CLUBBE.

Same day.

A previous order of the Vice-Chancellor, which had been omitted to be drawn up, ordered to be entered *nunc pro tunc*, if the Vice-Chancellor should think fit.

AN Order had been some time since made by the Vice-Chancellor in the matter of this petition, that certain dividends should be paid into the Court of Chancery, but the order had never been drawn up or entered.

Mr. *Bethell* now applied that the order might be passed and entered with the Registrar of this Court, *nunc pro tunc*.

The COURT directed it to be drawn up and entered by the officer of the Court of Chancery, if the Vice-Chancellor should think fit.

1833.

Ex parte
LEWIS.

Ex parte GRAZEBROOK.—In the matter of MILLER.

MR. AYRTON applied to postpone the hearing of this petition, which stood on the paper for Monday, the 4th November, on the ground that affidavits to the extent of 250 folios had been filed only yesterday. No notice, however, had been given of this application.

November 2.

Notice must be given of a motion to postpone the hearing of a petition, unless the motion is made when the petition is called on.

The COURT thought that notice was necessary; and therefore directed the motion to be renewed on Monday, when the petition was called on (a).

(a) And see *Ex parte Binns*, ante, 189.

Ex parte WILLIAM TAYLOR COPELAND and another, Assignees of BENJAMIN POWIS.—In the matter of ROBERT THOMPSON and THOMAS DANIEL MILDRED; and in the matter of JOHN EVANS (a).

THE petition stated, that on the 1st December 1831 a commission issued against *Thompson* and *Mildred*;

Westminster,
November 4 & 5.

A. procures goods, which he agrees with B. and C. shall be shipped on the joint adventure

(a) And see the next case.

of the three, and then draws bills on B. and C. for the amount of the cost of the goods, which they accept, A. engaging to renew the bills until the return proceeds for the goods are received. B. and C. manage the shipment, and direct the consignee to forward the account of the return sales to themselves. A. then applies to D. to discount two of these bills; and, to induce him to do so, undertakes that the proceeds of the goods shall be applied in liquidation of the bills; which undertaking, D., after discounting the bills, communicates to B. and C. All the parties become bankrupt; and part of the return proceeds come to the hands of the assignees of B. and C.—*Held*, that the proceeds were clothed with a trust for the payment of the bills, and that the assignees of B. and C. were bound to pay over such proceeds to the assignees of D.

1833.

Ex parte
COPELAND
and another.

on the 22d December 1831, a commission issued against *Evans*; and on the 18th October 1832, a fiat was issued against *Powis*.

Thompson and *Mildred* were general merchants, and *Evans* was a factor and warehouseman; and it was agreed between the parties, that *Evans* should procure a particular assortment of goods to the value of 1155*l.* 10*s.*, and deliver them to *Thompson* and *Mildred*, to consign abroad on the joint account of the three; but *Evans* was not to appear to the world as a party concerned in the transaction. *Evans* drew on *Thompson* and *Mildred* bills for the amount, which they accepted, and he engaged to renew the bills from time to time, providing for his half of the value of the goods, *until* the return proceeds for such goods were received. This was accordingly done; the invoices being made in the names of *Thompson* and *Mildred*, in which *Evans* appeared as the vendor of the goods only.

At the time of the above transaction, a letter was drawn up by *Thompson* and *Mildred*, and signed by *Evans*, as follows:—

“ Messrs. *Thompson* and *Mildred*.

“ Gents.

28th Sept. 1830.

“ You having bought sundry goods of me, as per invoice, amounting to 1155*l.* 17*s.*, I do hereby acknowledge the above goods to be shipped on the joint account of you and myself, each one half share. And I engage to provide you with funds to meet my proportion, say one half, as the bills fall due, and also to renew your own proportion of one half, until such times as the returns come home.

“ Yours, &c.

John Evans.”

Thompson and *Mildred* then shipped the goods to

Singapore, consigning them to Messrs. *Hunter* and *Wyatt*, (in which house *Powis* was interested in shipments from England,) with an invoice, stating them to be shipped on the joint account of *Thompson* and *Mildred* and *Evans*, but directing the consignees to forward the account of sales and returns to themselves, *Thompson* and *Mildred*; and the goods were insured by *Thompson* and *Mildred* in their own names only.

1833.

Ex parte
COPELAND
and another.

Evans being in want of cash, on the 2d September 1831, applied to *Powis* to discount the last set of the renewed bills, which he held for the goods, one of which was as follows:—

“ *Glasgow*, 1st Aug. 1831.

£562 : 7s.

Four months after date pay to my order five hundred and sixty-two pounds seven shillings, value received.

Peter Morton.

To Messrs. *Thompson* and *Mildred*, merchants.

(Indorsed)

Peter Morton.

Accepted at Messrs. *Masterman*
and Co.

John Evans.

Benjamin Powis.

Thompson and *Mildred*.”

Powis refused to discount the bills on the mere personal security of the parties, whose names appeared upon them; but did so, on receiving the following letter from *Evans*:—

“ *London*, 2d Sept. 1831.

Benjamin Powis, Esq.

SIR,

Inclosed I hand you two bills (a), and I shall esteem

(a) Both these bills were in the form of the above.

1833.

Ex parte
COPELAND
and another.

it a favour if you will discount the same. In requesting this favour, I beg distinctly to state, that you are not running the least possible risk; as the bills in question are the exact amount of goods furnished by me, and shipped on a joint account with Messrs. *Thompson* and *Mildred* and myself, per the *Magdalene*, or other vessels, which may bring the proceeds for the said joint shipments. I hereby engage, that the same shall be applied in liquidation of the bills in question, in case Messrs. *Thompson* and *Mildred*, or myself, shall fail to do so.”—“ In confirmation, I beg to state that I furnished the goods in question, nor have I received any payment, or part payment, of the amount from Messrs. *Thompson* and *Mildred*, save and except their acceptances as per account furnished herewith, and which the inclosed represent. Under these circumstances, Messrs. *Thompson* and *Mildred* can have no claim for the said returns, till the bills in question are retired by them, nor have they any interest in this transaction further than the profit and loss arising from the joint adventure. Yours, &c.

John Evans.”

Powis afterwards, on the day of the stoppage by *Thompson* and *Mildred*, and subsequent thereto, gave notice to them of his having discounted the bills, and of the contents of *Evans's* letter; to which they made no objection.

At the time of the bankruptcy of *Thompson* and *Mildred*, namely, on 1st December 1831, these two bills were outstanding.

In January 1832, the assignees of *Thompson* and *Mildred* received the bill of lading of part of the return

proceeds, to which *Powis* laid claim; and on their refusal to deliver it up, he prevented their obtaining the goods by giving a notice of his claim at the Docks. But by arrangement between the parties before Mr. Commissioner *Fonblanque*, the goods were sold for 984*l.* 4*s.* 7*d.*, without prejudice to the claims of the several parties, and the proceeds were deposited in the hands of a banker.

1833.

Ex parte
COPELAND
and another.

The petition prayed, that the assignees of *Powis* might be declared entitled to the 984*l.* 4*s.* 7*d.*, and the remainder of the proceeds of the goods, when they arrived; and that the remainder, if any, after satisfying the bills for 1155*l.* 10*s.*, might be divided between the assignees of *Thompson* and *Mildred*, and the assignees of *Evans*.

Mr. *Montagu*, and Mr. *Goodeve*, for the petitioners, the assignees of *Powis*. No notice was necessary to be given by *Powis* to *Thompson* and *Mildred* of the nature of his claims. But we shall show, that notice was, in fact, given; and if the Court shall be of that opinion, we shall then proceed to consider the effect of the notice.

In this transaction, it is clear from the nature of the speculation, that *Evans*, and *Thompson* and *Mildred*, were all three partners together. *Evans* procures the goods, and in fact undertakes to raise the money to pay for them, besides afterwards undertaking to appropriate these goods to pay for the bills in question. Being then a partner, he had power to bind the co-partners, as to the proceeds coming to the hands of the partnership, and had a right also to ear mark the property by this specific appropriation, even without notice

1833.

Ex parte
COPELAND
and another.

to the copartners. The *bonâ fide* contract entered into between *Evans* and *Powis*, as to property thus circumstanced, excludes from the case all the operation of the doctrine of reputed ownership.

But if the Court should think that notice of *Powis's* claim was necessary to be given by him to *Thompson* and *Mildred*, then we say, that such notice was in fact given; and that if it were given one moment before the act of bankruptcy, it is valid to all intents and purposes. In the case of *Hunt v. Mortimer (a)*, where a trader having a large order for goods from the East India Company, and not having sufficient funds to execute it, borrowed money of *B.*, upon an agreement that *B.* should receive the money from the Company for the order, and repay himself; and at the time of the loan *B.* knew the trader to be insolvent, and before the money became due from the East India Company, the trader was arrested several times and was bailed by *B.*, and so avoided committing an act of bankruptcy until after the money became due, when *B.* received it: it was held, that this was not a fraudulent preference. Mr. J. *Littledale* assigns as the ground of his judgment in that case, "that the payment was not voluntary, but the subject of a special contract made before the money was lent." And Mr. J. *Parke*, in his judgment, says, "In this case, it is true, there was no notice of the arrangement to the East India Company; but notice is not necessary in such cases to give an effect to an equitable assignment between the parties, though it is so for the purpose of preventing the title of assignees attaching, on the ground of the bankrupt being the apparent owner of that fund at the time

(a) 10 Barn. & Cr. 44.

of the act of bankruptcy, within the meaning of that clause of the late Bankrupt Act founded on the repealed statute of the 21 *Jac.* 1. Here no notice was required, because the monies received from the East India Company were paid over to the defendants long before the act of bankruptcy of both bankrupts." So, in this case, the money being borrowed on the faith of the promise, and carried into the partnership coffers, that is quite sufficient to render the contract between *Evans* and *Powis* obligatory on *Thompson* and *Mildred*. *Evans* was also a creditor of the partnership of the three, and had right to repayment out of the specific profits of the particular transaction. *Thompson* and *Mildred* could not, until *Evans* was repaid, touch one iota of the profits; and therefore *Evans* might be regarded, up to the time of payment, as the absolute owner of the proceeds, and might assign his lien in equity.

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Sir G. ROSE.—*Evans* was, certainly, a partner with *Thompson* and *Mildred*; and if they had all remained solvent, there is no doubt that *Powis*'s present claim would have been perfectly good, as between him and the three. But all the parties having become insolvent, it becomes a question how far the rights of their respective creditors are affected. In this way of looking at it, it is necessary, first, to ascertain whether there are any joint creditors of the three. If not, the material question is, as to the effect upon the separate creditors of *Evans*. As to them, it was no doubt competent to *Evans* to say to *Powis*, "you shall be entitled to a lien on my share," and then the next question is, what interest *Evans* had? To the extent

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of his share, *Evans* might certainly give *Powis* a lien; but that would require the assent of his copartners, without which there could be no specific appropriation. Here, then, it seems that notice and assent were given; and therefore I think the agreement lets in the equity operating on the property, to the extent of *Powis's* claim.

Mr. *Montagu*, and Mr. *Goodeve*, in continuation. There are no joint creditors of the three; but, supposing there were joint creditors, if the notice and assent of the copartners would give *Powis* the title against them, it is monstrous to contend, that the creditors of *Evans* alone can stand in any better situation. But even supposing there had been no such notice and assent, yet as there was an agreement by *Thompson* and *Mildred*, that the proceeds should be in the first place specifically liable to the payment of the bills, then, according to the principle of the case in *Ex parte Waring* (a), these proceeds are to be applied, according to the express agreement between *Evans* and *Powis*, to the specific appropriation mentioned in *Evans's* letter to *Powis* of the 2d September 1831 (b). At the time of the contract with *Evans*, the goods were in the hands of *Hunter* and Co.; and though *Powis* could have therefore no lien from actual possession, yet all that was necessary to give him a lien was, a written undertaking between the parties. As between *Evans* and *Powis*, there is no doubt of the existence of a contract for the specific appropriation of the return pro-

(a) 2 G. & J. 404; 2 Rose, 182, 19 Ves. 345.

(b) *Reid v. Hollinshead*, 4 B. & C. 867, and *Ex parte Perfect*, Mont. 25, were also cited in this part of the argument.

ceeds to the payment of the bills; as between *Evans* and *Thompson* and *Mildred*, there was also a similar engagement; and the notice by *Powis* to the latter parties uncontroverted is sufficient to give *Powis* a lien, without the necessity of a notice to Messrs. *Hunter* and Co., who were *Thompson* and *Mildred*'s agents. In the case of *Ex parte Waring* there was an actual pledge of the property, and a reputed ownership in *Brickwood* and Co., which there is not in this case; and even there the lien was established, not indeed *quâ* lien, but,—by a peculiarly circuitous mode of working out the equities between several bankruptcies,—the petitioner, as the bill-holder, was declared entitled to a demand on the fund, though not in the shape of lien arising in his own right. In that case, also, there was no contract for appropriation as to the third party; while here there is an express contract. But although that case was adverse to the creation of a lien in a third party, the circumstances of this case afford much stronger grounds for such lien; and the fact of the existing contract, and the notice by *Powis*, are quite sufficient to entitle *Evans*'s assignees to have their estate exonerated from the burthen of proof on the bills, by the specific appropriation of the proceeds of the return cargo to retire them. Here there was no order and disposition of the property in *Thompson* and *Mildred*; for although the goods might, by being delivered to the carrier across the seas, (if we may use such an expression), be considered to be in the hands of the consignees, yet, pursuant to the contract between *Evans* and *Thompson* and *Mildred*, the return proceeds would come to the hands of the latter clothed with this trust,—that, as between *Evans* and *Thompson*

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and *Mildred* the proceeds should be applied to take up the bills. In *Ex parte Taylor* (a), it was held, that goods in the hands of an agent are not in the reputed ownership of the principal. The case of *Ex parte Waring* (b) is certainly one of very considerable doubt and difficulty; but even there, although in the face of reputed ownership, and in the absence of any privity of contract, a lien was created for the holder of the bills. [The case of *Hervey v. Liddiard* (c) was also alluded to.]

Mr. *Anderdon*, and Mr. *Heathfield*, for the assignees of *Evans*, contended to the same effect.

Mr. *Swanston*, and Mr. *Edward Hughes*, for the assignees of *Thompson* and *Mildred*. The doctrine of order and disposition is the governing criterion to form a right judgment in this case; for it cannot be doubted, if we show that there is no contract to affect the goods, the property in them vests in our clients. The construction we place on the letter of the 28th September 1830, which is said to be the foundation of the contract, is this:—We say, that *Thompson* and *Mildred* were a distinct firm from *Evans*; and that they must be considered as the purchasers, and *Evans* the vendor, of the goods, which formed the subject of that letter. The transaction must be regarded as a sale, in the produce of which *Evans* only retained a partial, and not an entire, interest; he being, in fact, also a dormant partner with *Thompson* and *Mildred*, and being liable as such for part of the cost of the purchase. To the eyes of the world,

(a) 1 Mont. 240.

(b) See *supra*, p. 206.

(c) 1 Stark. 123.

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indeed, *Evans* appeared as the vendor, and as such entitled to the full price of the goods supplied to the adventure. It became necessary, therefore, to counteract the effect of this; and as a means of doing so, *Thompson* and *Mildred* caused him to write the letter which has been already alluded to. This letter was never intended to be a contract binding *Thompson* and *Mildred*, and cannot be supposed to have any such effect. It was given for the safety and protection of *Thompson* and *Mildred*, and not to charge them with any contract, but to qualify *Evans's* right in the event of his bankruptcy. It is, too, his own letter, and cannot be set up as evidence in his favour. The cases of *Ex parte Chuck* (a), and *Ex parte Enderby* (b), decide, that the property of a dormant partner, in the hands of his copartners at the time of their bankruptcy, is in their order and disposition, and therefore passes to their assignees. Having thus shown the absence of any contract, and the fact of *Evans* being a dormant partner in this case, we say there is an end of the question.

With regard to the letter from *Evans* to *Powis* of the 2d September 1831, can it be said that that is evidence against *Thompson* and *Mildred*? It is easy to be understood how, as between *A.* and *B.*, the letter of *A.* may bind *B.*, when it refers to or qualifies a matter either past or pending, or where it is subsequently confirmed by the acts of *B.* But how a letter of *A.* to a third person can bind *B.*, it is impossible to comprehend. The letter to *Powis*, therefore, unless confirmed by the subsequent acts of *Thompson* and *Mildred*, cannot be read as evidence against them.

(a) 1 Mont. 457.

(b) 2 Barn. & C. 389.

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They were no parties to it, nor did it in any way affect them. It should be remembered, that the present application seeks to claim an interest in the entire fund, and not only in *Evans's* share of it. Now, if any part of the fund is liable to the petitioners, the utmost must be *Evans's* share. [*Erskine*, C. J. If this were conceded to you, yet the silence of *Thompson* and *Mildred*, in answer to *Powis's* notice to them, must be taken as a recognition by them of *Evans's* act.] If indeed *Thompson* and *Mildred* had, in any way, dealt with or acted under this notice, and *Evans's* letter to *Powis*, it might have been evidence of a recognition. But supposing it had been the intention of the parties, by the letter of September 1830, to give *Evans* a specific lien, that would have been expressed in the letter, and *Thompson* and *Mildred* would have signed the letter. As this, however, has not been done, it may be fairly inferred, that the sole object of the letter was to save *Thompson* and *Mildred* harmless to the extent already adverted to.

Again, even admitting that the letter forms a substantive contract as against *Thompson* and *Mildred*, what power has a trader to give a lien to another person by a secret contract, so as to defeat his general creditors? If the doctrine of reputed ownership would have applied in the event of there being joint creditors of the three, it is very difficult to understand why it should be different in the case of separate creditors only. If *Powis* had had actual possession of the property, there would have been no doubt of his right; but if a mere secret letter, passing between a debtor and creditor, is to be held to give the latter a specific lien on property *in transitu*, this monstrous evil would follow,—namely, that a trader has nothing to do but to

buy goods to stock his shop, and to give the vendor a letter such as the present; and, whatever credit he may derive from the possession of the goods, all his other creditors, who trust him on this ground alone, will, on his bankruptcy, be kept out of any participation in one farthing of his property. This however, it is quite manifest, is contrary to the clearly expressed intention of the legislature, in the introduction of the principle of reputed ownership. We say, then, *first*, there is no evidence affecting *Thompson* and *Mildred* with the contract, which has been endeavoured to be set up; *secondly*, that *Evans* has no right to bind his general creditors; and *thirdly*, that the inference arising from reputed ownership cannot be avoided by mere secret contract with any particular creditor.

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Mr. *Montagu*, in reply, was stopped by the Court.

ERSKINE, C. J.—We are unanimously of opinion, that the petitioners have made out a case, that entitles them to have their prayer granted. In deciding the present case, however, I do not think that it is necessary to call into question the doctrine laid down in *Ex parte Waring*; because in that case there was no privity of contract between the parties, that the bill-holders should have a right to resort to the property deposited with the bankers as a security. But even in that case Lord *Eldon* decided, that though there was no privity so as to give a lien, yet that the equity of the case could be reached by giving the assignees of the bankers a right to retain the security, so as to work out the same result.

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If, in the case now before the Court, there had been no contract between the owners of the goods and the holder of the bills, then, indeed, the applicability of *Ex parte Waring* might have been brought into discussion. But this case turns wholly on the evidence of a contract; which contract was made with *Powis* by *Evans*, who was the joint owner of the property; and he expressly contracts to appropriate the proceeds of the return cargo to the retiring of the bills in question. On the faith of this engagement, *Powis* discounts the bills, and takes the risk upon himself. It was argued by the counsel for the assignees of *Evans*, that if the case went no further than this, and if there was no acquiescence on the part of *Thompson* and *Mildred*, the contract between *Powis* and *Evans* being established, that was sufficient, because the contract of one of the three partners would be sufficient to bind the rest; and the case of *Reid v. Hollinshead* (a), was relied on in support of that proposition. But, I confess, I am not prepared to go to that extent; for I do not think the case cited is analogous to the present; inasmuch as in that case the party trusting was in actual possession of the goods, and was ignorant of the interests of the other partners. In this case, however, there was no possession, and the very letter of *Evans* to *Powis* discloses that it was joint property. And I should be very much inclined to doubt the power of one partner to bind the interests of his copartners in such a case, where the pawnee has notice of their joint proprietorship; and if this case rested there, I should say, that the petitioners had no right. In the ordinary transactions of trade, one partner has undoubted authority

(a) 4 B. & C. 867.

to bind his copartners; but where the dealing, as in this case, is out of the ordinary course, there it becomes a question, if such partner has adequate authority from his copartners for what he does. In answer to this objection, it is said, that *Powis* gave notice to *Thompson* and *Mildred* of the engagement which *Evans* had entered into with him; and that they never made any objection to it. But it is not particularly stated in the petition, at what time the notice was given, whether before, or after, the act of bankruptcy. If the latter, it could be of no avail against *Thompson* and *Mildred's* creditors. If the former, the subsequent acquiescence and adoption of the transaction of discounting the bills, rendered it binding on them, according to every established principle of equity. But, putting aside that question, let us see, if there was any authority given to *Evans* by *Thompson* and *Mildred*. The second letter of *Evans*, taken by itself, certainly does not amount to an authority; but it is evidence, when coupled with the first letter, of an authority previously given to him by *Thompson* and *Mildred*, more especially after their silence, and neglect to repudiate it. But I think it may be clearly implied from the construction of the first letter alone, that it was the intention of the parties, that the return proceeds should be liable to the payment of the bills, before any division of them by the three partners. But it is said, that that letter, being signed by *Evans* only, cannot bind *Thompson* and *Mildred*. It is true, that a mere writing of this description is not sufficient alone to have that effect; but if this construction is put upon it by a third party, who communicates to them his own construction of it, and they do not think fit to repudiate such construc-

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tion, but suffer him to act upon the view he has taken of it, I think then that a letter of this description, although not so binding as if signed by *Thompson* and *Mildred* themselves, is quite sufficient to show an authority from them by implication. Looking then at the whole of this transaction, although I at first doubted whether there was any intention of specific appropriation, I am now of opinion that such was the clear intention of the parties; and viewing the letters as evidence of the contract and authority, the great difficulty in the case is got over; and therefore it appears to me, that the petitioners have satisfactorily established their case, unless, as it has been contended, the doctrine of reputed ownership interferes with their claim. If, however, it be true, that the contract was made with *Evans*, before he and *Thompson* and *Mildred* became bankrupt,—of which no doubt exists in my mind,—then the proceeds which have, or may, come to the hands of *Thompson* and *Mildred*, or of *Evans* and *Thompson* and *Mildred*, come there clothed with a trust, to be applied, in the first place, to take up the bills which were discounted by *Powis*; and that being so, the decisions on the subject clearly show, that *Powis* becomes entitled, as against the separate creditors of either of the parties. It appears, that there are no joint creditors of the three; and therefore, what effect their interests would have upon the question, it is not necessary here to consider.

Sir J. Cross.—There has been a great difficulty thrown upon the Court in this case, in arriving at the true state of facts, by the duplicity of *Thompson* and *Mildred*, and *Evans*, in their endeavour to conceal

from the world the latent interest of *Evans*. The invoice was so made out, as to make it appear that *Evans* was the vendor, and the others only the vendees of the goods. Then we find a secret agreement between the parties, as to the payment for the goods; which brings to light the true relationship between the three parties. The invoice assigns the whole property in the goods to *Thompson* and *Mildred*, together with the burthen of payment for them; while the memorandum signed by *Evans* gives back to him an interest in a moiety of their profits, and a liability co-extensive as to the payment for them. Whether, or not, the property in the goods thus became re-vested in *Evans*, I have not yet decided in my own mind. But my impression is, that the property in the goods remained in *Thompson* and *Mildred*, leaving certain rights vested in *Evans*, as the vendor. If the exclusive property were in *Thompson* and *Mildred*, there could be no necessity for referring to the clause of reputed ownership (a); for that merely relates to possession, without ownership; and if the bankrupt be the true owner, the clause does not apply. If, however, *Evans* were the exclusive owner, it might be doubtful how far the statute would operate, especially when considered with the circumstance of the secrecy of his interest. But that is certainly not the fact. Either they were all three joint owners, or else the two were the exclusive owners; and then the statute cannot apply, as I have already endeavoured to show. I am inclined to think, that the intention of the parties in the original transaction was, that a lien should be

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(a) 6 Geo. 4. c. 16. s. 72.

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created in favour of *Evans*, and that *Thompson* and *Mildred* were the owners of the goods; for a man cannot be said to take a lien on his own property. My construction of the first contract, namely, the letter of the 28th September, is, that it was intended to give to *Evans* a right to have the bills paid out of the return proceeds, in the first instance. Having that right, the next question is, had *Evans* a right to transfer his lien? I am clearly of opinion that he had; and this, even independent of any implied contract between *Powis* and *Thompson* and *Mildred*; for it was the only means whereby he could get *Powis* to discount the bills. *Powis*, therefore, having the same right as *Evans* possessed, his assignees have a lien on the property in question, for the purpose of satisfying the bills which he had discounted on the faith of such lien, although there had been no subsequent recognition by *Thompson* and *Mildred*.


Sir G. ROSE.—The question before us, now, resolves itself into a question of fact. *Evans*, as a partner with *Thompson* and *Mildred*, had they remained solvent, would have had an undoubted right to bind them, by taking up money on the credit of the partnership, and applying it to partnership purposes. But insolvency having happened, it was necessary for us to consider the effect of this transaction upon their respective creditors. If there had been any joint creditors of the three, it might have been very questionable, whether this petition could have been granted; and I think the order we make must provide for the ascertaining that fact. It is said, indeed, that there are no such joint creditors; and, as to his own share, *Evans* might bind

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his separate creditors, by giving the lien in question to *Powis*, if notice had been (as it appears to have been) given to his copartners. Consequently, all the three parties might bind respectively their separate creditors, and *Thompson* and *Mildred* their joint creditors, if they chose so to do. If we find, therefore, such an agreement entered into by *Thompson* and *Mildred* with *Powis*, then the property would come to their hands merely as trustees, and the doctrine of order and disposition is out of the question. But did *Thompson* and *Mildred* so agree that their interest should go to pay the bills in question? And was *Powis's* notice to them given before *Thompson* and *Mildred's* act of bankruptcy? Upon the best consideration I have given to the whole of the case, I can do no less than answer these questions in the affirmative. During the existence of the agreement, the goods came to the hands of the assignees of *Thompson* and *Mildred*, clothed with a trust, that would, beyond a doubt, be administered by a Court of Equity; and had not bankruptcy intervened, it is clear that *Powis* could, upon the case made out before us, have obtained an injunction to prevent any disposal by *Thompson* and *Mildred* of the return proceeds, so long as the bills which he held remained unpaid. This petition must, therefore, be granted.

[See the Order in the next case.]



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Ex parte WILLIAM GEORGE PRESCOTT, WILLIAM WILLOUGHBY PRESCOTT, GEORGE GROTE, and CHARLES GROTE, Bankers, in London; ROBERT LINSELL and WILLIAM HOGG, Bankers, at Biggleswade; and WILLIAM THOMAS and JOHN FELTHAM, Bankers, in London.—In the matter of ROBERT THOMPSON and THOMAS D. MILDRED.—And in the matter of JOHN EVANS.

*Southampton
Buildings,
February 18.*

A. supplies goods at his own cost to B. and C., which it is agreed shall be shipped on the joint account of the three; and that A. shall draw bills on B. and C. on account of the return proceeds, he undertaking to renew the bills until funds come round, so as to keep B. and C. out of cash advances. B. and C. accept the bills, and consign the goods to their correspondent abroad, with directions to transmit the account of sales and the proceeds to themselves. A. discounts the bills with parties, who have no knowledge of the bills being drawn on account of the joint shipment, and are not made ac-

THIS was a petition in the same bankruptcies as in the last case.

The petition, after noticing the commission against *Thompson and Mildred*, which issued on the 1st December 1831; the commission against *Evans*, which issued on the 22d December 1831; and the fiat against *Powis*, which issued on the 18th October 1832; stated the following facts:—*Thompson and Mildred*, and *Evans*, had considerable dealings together previous to their respective bankruptcies; *Evans* selling large quantities of Manchester and other goods to them, for which he took their acceptances at various dates; and there were also many other transactions between the parties, as to the discounting and exchanging of bills of exchange, and in various shipping adventures. In these last adventures *Evans* provided and delivered, at his own cost, the goods to *Thompson and Mildred*, and drew on them bills for the amount, which they accepted; it being agreed, however, that *Evans* should renew the bills from time to time, so as to keep *Thompson and Mildred* out of cash advances, until the return proceeds of the outward shipments should

acquainted with that circumstance until after the respective bankruptcies of *A.*, and of *B. and C.*—*Held*, that the bill-holders have, nevertheless, a lien on the return proceeds of the shipment, which came to the hands of the assignees of *B. and C.* subsequently to their bankruptcy. *Sir J. Cross, dubit.*

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arrive; which, after deducting the charges of shipment, insurances, sales, &c., were specifically to be applied to the payment of the bills; and the profits or loss attending such joint adventures or shipments were to be shared, half by *Thompson* and *Mildred*, and the other half by *Evans*.

Thompson and *Mildred* shipped the goods to their correspondents abroad, on the joint account and risk of themselves and *Evans*, and kept separate accounts of such joint shipments, unconnected with their other general accounts; the accounts, also, of each joint adventure of this description being kept distinct and separate from those of other joint adventures.

In August 1831 *Thompson* and *Mildred*, and *Evans*, agreed to make a joint adventure or shipment to Turkey, it being thereupon agreed that *Evans* was at his own cost to supply the goods, and to draw on account of the return proceeds upon *Thompson* and *Mildred* bills of exchange for the following sums, viz. 420*l.* 16*s.*, 432*l.* 9*s.*, and 223*l.* 4*s.*, to be paid out of the return proceeds when they should arrive. In pursuance of this agreement, *Evans* supplied goods to the amount of 1076*l.* 9*s.* to *Thompson* and *Mildred*, to be shipped on the joint account; whereupon *Thompson* and *Mildred* prepared the following letter relating to such shipment, which *Evans* signed.

“ Messrs. *Thompson* and *Mildred*, London.

“ Having sent you an invoice, dated 23d August, for 2283 pieces of dyed sarsnets, 8635 pieces & twills, amounting to 853*l.* 5*s.* 9*d.*; also an invoice, dated 30th August, for 992 pieces & coloured satin spots and stripes, amounting to 223*l.* 4*s.*; and you having shipped the same to your correspondents at Smyrna, Constantinople,

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and Alexandria, as per bills of lading, I hereby engage to be responsible to you for half the loss that may arise on the foregoing enumerated goods, and also to bear you harmless from any loss that may arise on the dyed sarsnets between 5*s.* and 5*s.* 3*d.* per piece; and having drawn bills on you for the whole amount at dates convenient to myself, I hereby engage to renew the same, until funds come round, without any charge for interest or stamps, until the 4th April 1832. Should any profit arise on the net proceeds of these, I shall look to you for my half share.

I am, &c. &c.

J. Evans."

Three bills for 420*l.* 16*s.*, 432*l.* 9*s.*, and 569*l.* 13*s.* were accordingly drawn by *Evans* upon and accepted by *Thompson* and *Mildred*; the last bill including not only the sum of 223*l.* 4*s.* above mentioned, but also a sum of 346*l.* 9*s.*, which *Evans* had to draw on another account. Before *Thompson* and *Mildred*, or *Evans*, stopped payment, the petitioners, *Prescott* and Co., discounted the bill for 420*l.* 16*s.*; the petitioners, *Linsell* and Co., the bill for 432*l.* 9*s.*; and the petitioners, *Thomas* and Co., the bill for 569*l.* 13*s.*; who continued to be the respective holders of such bills. *Thompson* and *Mildred* sent part of the goods to *Sandison* and Co., of Constantinople, and the remainder to *Casey* and Co., of Alexandria, with letters and invoices, in which they stated, that the shipment was made "per account of Mr. *John Evans*, but having accepted against them, the sales and remittances are to be made to us direct, per appointment, for account I E."

Thompson and *Mildred* kept an account of this adventure distinct from all other accounts with *Evans*.

Linsell and Co., the holders of the bill for 569*l.* 13*s.*, in ignorance that the 223*l.* 4*s.* formed part of it, or that the latter sum was drawn for by *Evans* on account of the joint shipment and his lien thereon, proved the whole of the bill against the estate of *Thompson* and *Mildred*, and received two dividends on such proof.

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Thomas and Co. also proved the bill of 432*l.* 9*s.* against the estate of *Thompson* and *Mildred*; but, having been afterwards advised they had a lien on the return proceeds of the shipment above mentioned, they had declined to receive any dividend under the estate.

Prescott and Co. also claimed the bill of 420*l.* 16*s.* against the estate of *Thompson* and *Mildred*, but “without prejudice to their claim to be paid the said debt in full from the proceeds of certain shipments of goods made jointly by the said bankrupts and *J. Evans*, against which the bill was drawn, and agreed to be paid thereout.”

About May 1832 the assignees of *Thompson* and *Mildred* received part of the return proceeds of the goods shipped to *Casey* and Co., in remittances amounting to 310*l.* 16*s.* 11*d.*, with an account sales.

About August 1833 the assignees of *Thompson* and *Mildred* received also an account current from *Sandison* and Co., in which credit was given to *Thompson* and *Mildred* for 35,189 piastres and 69 cents, as the proceeds of the goods shipped to *Sandison* and Co.; but at the same time it was stated in another account, that of such 35,189 piastres, 29,435 piastres were then outstanding; but that if the whole sum was received, it would, at the then exchange of 95 piastres per pound sterling, amount to 370*l.* 8*s.* 2*d.*

On the 11th September 1832 the assignees of

might cause distinct accounts to be kept of the joint shipment beforementioned; that the joint creditors of *Evans*, and *Thompson* and *Mildred*, in respect of such shipment, if any, might be at liberty to go in under such commission, and prove their respective joint debts, regard being had to the circumstance of *Evans* having been a dormant partner with *Thompson* and *Mildred*, in respect of the joint shipment; and that all reasonable and proper charges might be paid out of the sum of 681*l.* 5*s.* 1*d.* That after payment of such charges, the residue of such sum, together with the further net monies arising from the return proceeds of the joint shipment, might be applied to the payment of the joint creditors of *Evans*, and *Thompson* and *Mildred* (if any), in respect of the said joint shipment, and then in payment of the bills held by the petitioners respectively; or that the residue of the sum of 681*l.* 5*s.* 1*d.*, after payment of such charges, together with such further net monies of the return proceeds, and together with the other joint estate and effects of *Evans*, and *Thompson* and *Mildred*, might be applied generally in payment of the joint creditors of *Evans*, and *Thompson* and *Mildred* (if any), and then in payment of the several bills of exchange in the petition mentioned, and of the bills, if any, of all other creditors similarly circumstanced; and that for the purposes of such last-mentioned alternative, the Commissioner might cause distinct accounts to be kept of the general joint estate and effects of *Evans*, and *Thompson* and *Mildred*, and of their separate estates respectively, and likewise of the joint estate and effects of *Thompson* and *Mildred*; and that the general joint creditors (if any) of *Evans*, and *Thompson* and *Mildred*, might be at liberty to prove their respec-

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tive debts, regard being had to the circumstance of *Evans* having been a dormant partner; and in either of the alternatives, that the surplus of the funds respectively, if any, might be paid over to the several assignees of *Evans*, and of *Thompson* and *Mildred*, according to their respective shares and interests therein.

Mr. *Montagu*, and Mr. *Spence*, for the petitioners. The only difference between the circumstances of this case, and that of *Ex parte Copeland*, is, that in the one now before the Court there was no express contract between the indorsers and the petitioners, as holders of these bills, that they should have a specific lien upon the property in question.

The law, as it now stands, according to the cases of *Ex parte Waring* (a), *Ex parte Parr* (b), and *Ex parte Perfect* (c), gives to the holder of a bill of exchange the benefit of a contract for security entered into by other parties with the bankrupt, although there was no immediate privity of contract between the holder and the bankrupt. If there were joint creditors of *Evans*, and *Thompson* and *Mildred*, our right to the relief we seek might be questionable. But assuming there are none, what rights have the separate creditors against this property? The separate creditors can only claim through the respective bankrupts, whose creditors they are; they can only take the property, subject to all the liens and liabilities which would attach to it, if in the hands of the bankrupt himself. And if a bill were filed, to ascertain the rights of the

(a) 2 Rose, 182; 19 Ves. 350; 2 G. & J. 404.

(b) Buck. 191.

(c) Mont. 25.

parties, the proceeds of the joint adventure would be applied, first, in payment of the joint creditors of the three, if any, and then in payment of such liens as the funds were liable to.

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Mr. *Anderdon*, and Mr. *Heathfield*, for the assignees of *Evans*, adopted a similar line of argument.

Mr. *Swanston*, and Mr. *Edward Hughes*, for the assignees of *Thompson* and *Mildred*. At law, there could be no doubt, but that we should be held entitled to retain the property in question; for it is manifest that the legal title to it is in us. The question then is, what difference is there in equity? Is there any equity in favour of the petitioners? We say, that there is none. As between them and the respondents, there is a total absence of contract, as to the specific appropriation of the proceeds of the shipment to the payment of the bills in question. The petition itself states, that the petitioners were not even aware of the existence of any such contract, as between *Evans*, and *Thompson* and *Mildred*. There is no equity, then, in respect of contract; neither, if it were held to exist, independently of that circumstance, can it be contended to exist, when the terms of the contract between the three are properly considered. Under that agreement, *Evans* was bound to procure the renewal of the bills, up to a certain time. But how was the mutuality to be enforced, as against the bill holder? Supposing an action had been commenced against *Thompson* and *Mildred* for payment of a bill due, before the return proceeds came home; could they, in answer to such an action, have set up the agreement between them and

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Evans, as binding upon the bill-holder? If they could not, then inasmuch as the parties claiming one part of the equities affecting the bills, must be bound by all the equities, and all parts of the contract, there can be no lien upon this property.

The case of *Ex parte Waring* has been reported by three different sets of reporters, who must have thought it a very extraordinary case, to have given it so often to the public; an opinion well justified by the peculiarity of the decision, which we venture to pronounce very questionable in principle. But even admitting that case to be a valid authority, how does it bear upon the present petition? There the property was affected by virtual deposit; but here the equity was nothing more than a personal right in *Evans* to have the specific proceeds of the shipment applied to discharge his liability upon the bills. And his personal right was of such a nature that he could not, even if he had attempted it, have transferred it to a stranger to *Thompson* and *Mildred*. In the former case of *Ex parte Copeland* (a), there was both contract and notice; and those incidents were quite enough to justify the view the Court took upon that occasion. But here there is neither contract, nor notice, nor even knowledge of a contract; which are the first ingredients inquired into by a Court of Equity. [*Erskine*, C. J. The main argument in *Ex parte Perfect* (b) was, that there was no contract, and that argument failed.] In that case the acceptances were given on the faith of the remittances. But this is a mere contract for indemnity; and, there being no damage to *Evans*, it is difficult to see how this contract can be enforced in the

(a) *Ante*, p. 199.

(b) *Mont.* 25.

way now insisted upon, especially at the instance of a party who is a stranger to it.

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Mr. *Montagu*, in reply, was stopped by the Court.

ERSKINE, C. J.—Under the circumstances of this case, it is altogether immaterial to consider whether there is a partnership, or not, between *Evans* and *Thompson* and *Mildred*,—or whether it was a mere sale by *Evans* to the others; for, at all events, there was an agreement in the nature of a pledge for a specific appropriation of the proceeds of the shipment to the payment of the bills, which were accepted by *Thompson* and *Mildred* in consideration of the goods composing that shipment, which had been previously furnished by *Evans*. The question is, whether the holders of the bills, who had not even notice of the contract, can claim the benefit of it? I think, that the case of *Ex parte Perfect*(a) is a direct authority to show, that they have such right. In that case, where the circumstances were almost parallel to those of the present, the Vice-Chancellor said he thought that the case was governed by *Ex parte Waring*, and *Ex parte Parr*,—and that the meaning of *Ex parte Waring* was, that the depositaries were to be indemnified, but that they were to be indemnified by applying the proceeds of the security in payment of the bills as far as they would go, and that the holders were entitled to prove against both estates for the deficiency, if any; and he thereupon made the order as prayed. That case would therefore be conclusive upon the present, even if there were no part-

(a) Mont. 25.

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nership between *Evans* and *Thompson* and *Mildred*. But, looking at all the circumstances before us, it is manifest that, as regards this particular transaction, a partnership did exist in substance; for the contract between them was, that the goods should be passed over to their joint account. And the only way in which the question of partnership could bear upon the rights of the parties in this case would be, how joint creditors of the partnership would be affected. Here, there are only joint creditors of each particular shipment. But as I cannot understand the contract in any other way, than as creating a specific right in *Evans* to have the return proceeds applied in discharge of the bills, I therefore think, upon the authorities referred to, that the bill holders have a similar equity through *Evans*.

: Sir J. CROSS.—It seems to me, that the goods were originally the property of *Evans*, and that he sold them to *Thompson* and *Mildred*. They undertook to pay for them, and they became their property, inasmuch so, that *Evans* draws bills upon them which they accept. After that, a new state of things arises. *Evans* becomes a part-owner, having a moiety in the profits, and restricting his right to the payment for the moiety of the goods supplied, until the return cargo should come to hand; for the letter of *Evans* says, "I hereby engage to renew the bills until the funds come round." *Evans* therefore could not have demanded payment until then, because he was under an engagement to renew the bills. It was not obligatory on him to renew the bills, if he had preferred taking them up; but then he would have had a right to

repayment out of the return cargo, in the first instance; as he possessed a lien to that extent. Then did *Evans*, when he indorsed the bills to the petitioners, pass the lien which he had by his indorsement? It is said, that he did not expressly do so: nor do the petitioners pretend that he did. Neither does it appear to me, that he intended to transfer his lien; nor did the bill-holders then consider that they had any such advantage. I cannot understand, then, how this lien was transferred by him, where there was no intention on either side that he should do so. *Evans's* assignees have certainly a lien on the property; but I cannot conceive how the bill-holders can have any.

These bills carried with them an obligation of renewal, until the funds came round. But I do not find, that there was any obligation upon the bill-holders to renew; and under this view of the case, I think it is materially distinguished from *Ex parte Perfect*. As I am at present advised, therefore, I think that these petitioners are not entitled to a lien on the proceeds of the shipment towards the payment of the bills; although there is no doubt that *Evans's* assignees may claim such lien, and may of course make what arrangements they may think proper between themselves and the petitioners. I do not wish, however, to pronounce a decided opinion upon the case; for I have still very considerable doubts upon the question.

Sir G. ROSE.—It is perfectly immaterial in this case, whether the equity of it is to be worked out by *Evans's* assignees, or by the petitioners. The acceptors of the bills contracted a certain liability, as to the appropriation of the proceeds arising from the shipment of

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the goods. When the bills were indorsed by *Evans*, he gave to the petitioners, of course, no more than the legal right of holders; but then they take them, in equity, with all the equities attaching to the drawer; and by this equitable assignment are entitled to all the benefit of working out their equities; nor does it rest with *Thompson* and *Mildred*, or *Evans*, to set up any objections to those equities. I always understood, that the principle on which *Ex parte Waring* was founded, was this,—that where the original intention of the parties was to appropriate property to a certain purpose, in such a transaction, bankruptcy would not affect that intention, nor deprive third parties of the benefit of it. This case, in principle, in no ways differs from that of *Ex parte Copeland* (a), though there is a slight difference in the facts; for in that case, by the effect of a specific contract between the holders of the bills, and the two other sets of parties, the former acquired a right adverse to the other creditors of the same adventure. The petitioners in this case are, I think, entitled to the proceeds of the joint adventure as a pledge, without any direction as to election.

The order made was as follows: that the Commissioner should cause distinct accounts to be kept of the joint shipment and property mentioned in the said petition, being joint estate and effects of the said bankrupts *John Evans*, *Robert Thompson*, and *Thomas Daniel Mildred*, and of the separate estates of *Thompson* and *Mildred* respectively, and likewise of the joint estate and

(a) See ante, p. 190.

effects of *Thompson* and *Mildred*. That the joint creditors of the said *John Evans*, *Robert Thompson*, and *Thomas Daniel Mildred*, in respect of the said shipment, (if any) should be at liberty to go in under the commission and prove their joint debts, regard being had to the circumstance of *Evans* having been a dormant partner with *Thompson* and *Mildred* in the joint shipment of the goods in the said petition mentioned. That all reasonable and proper charges and expenses incurred in the shipment and assurance of the said goods, and the costs of all parties occasioned by this application, should be paid out of the sum of 984*l.* 4*s.* 7*d.*, mentioned in the said petition. That it should be referred to Mr. *Gregg* to tax and ascertain such costs, and after payment thereof, that the residue of the said sum of 984*l.* 4*s.* 7*d.* should be paid to the assignees of *Thompson* and *Mildred*; and that the same, together with the further net monies arising from the return proceeds of the said joint shipment, should be applied in payment of the joint creditors of the said *John Evans*, *Robert Thompson*, and *Thomas Daniel Mildred*, (if any) who should come in and prove their respective joint debts under the said commission; and then in payment to the petitioners of the bills in the petition mentioned to have been discounted by the said *Benjamin Powis*, on the pledge or security of such joint shipment and return proceeds, amounting to the sum of 1155*l.* 10*s.* with interest thereon, and in payment of the bills

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(if any) of all other creditors similarly circumstanced, in respect of the said joint shipment; and that the assignees of *Thompson* and *Mildred* might sell such part of the further return proceeds in respect of the shipment, as might not consist of money, and apply the same accordingly; and that the several parties should have notice of all proceedings taken under this order; and that the surplus of the said further return proceeds, (if any) be paid over to the assignees of the said bankrupt, *John Evans*, and to the assignees of the said bankrupts, *Robert Thompson* and *Thomas Daniel Mildred*, according to their respective shares and interest therein; and in the event of such surplus, that a copy of this order be served on one or more of the separate creditors of largest amount of the said bankrupts, *Robert Thompson* and *Thomas Daniel Mildred*, respectively, with liberty to such creditors respectively, or either of them, to apply as they may be advised.

Westminster,
Nov. 2, 1833.

Ex parte LABREY.—In the matter of WILKS.

An affidavit,
after being filed,
cannot be with-
drawn, so as to
prevent the
other side from
making use of
it, on the hearing
of the petition.

MR. KOE, and Mr. G. Richards, moved that this petition might stand over, in order to answer an affidavit.

Mr. Swanston, *contra*, offered to withdraw and abandon the affidavit.

Mr. *Koe* insisted that that could not be done, as his side might have occasion to make use of the affidavit, and therefore that it was necessary they should have time to answer it.

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The COURT thought that Mr. *Koe* would have a right to read the affidavit, if he thought fit, when the petition came on; and if he did, and it was necessary to answer it, time would be given to him. If not, there was no necessity for the hearing to be delayed.

Ex parte MUNK.—In the matter of CLARKE.

Westminster,
November 4 & 8.

MR. *MANSEL* moved that one of the Registrars of the Court should be directed to attend with, and produce, the file of the proceedings in this bankruptcy, on the trial of an action brought by the petitioner against the official assignee.

The Court will not order the Registrar to attend with the proceedings, at the trial of an action, on behalf of a party who is a stranger to the commission.

The COURT said, that if the applicant were a party to the commission, and his object were not to upset it, examined copies of the documents might be furnished, or the originals themselves might be produced. But as this was an application by an adverse party, and a stranger to the commission, the Court thought it right, as against him, to protect the commission from being defeated; and therefore refused the motion (a).

(a) See also *Laing v. Barclay*, 3 Star. 38, where it was held that the solicitor to the commission is not bound to produce the proceedings under the commission in a collateral action, where the production might tend to the detriment of his clients.

1888.

Ex parte THOMAS.—In the matter of THOMAS.

*Westminster,
November 19.
Cor. Sir J. Cross.*

A surrender at a prior meeting is sufficient, where the bankrupt becomes unable, by illness, to surrender at the last meeting.

MR. SWANSTON moved that this commission might be superseded, with the consent of all the creditors. The bankrupt did not attend precisely on the forty-second day to make his surrender; but he had in fact surrendered at a prior meeting, and illness was his only excuse for non-attendance on the forty-second.

Sir JOHN CROSS thought that this was a sufficient excuse, and therefore made the order as prayed.

**Ex parte HAWLEY.—In the matter of RICHARDS,
alias EDWARDS.**

*Westminster,
November 22.*

Quere, as to the signature of a special case, on appeal, by one of the judges of the Court of Review.

A QUESTION arose in this case, as to signing a special case, on appeal to the Lord Chancellor, in the discussion of which,

Sir G. ROSE expressed his surprise to find that the Lord Chancellor had been reported to have said, that the judges of the Court of Review were bound, as of right, to sign a special case, and that they could not exercise a discretion as to the matter (*a*). His Honour added, that he conceived there must have been on that occasion some error, or misunderstanding, on the part of the reporter; but that, at all events, he, for one, could never subscribe to such a doctrine (*b*).

(*a*) See *Ex parte Cunningham*, Mont. & B. 285.

(*b*) See a note on this subject, *ante*, p. 85.

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**Ex parte MARGARET MILNER.—In the matter of
JOHN BEST.**

*Westminster,
November 23.*

THIS was a petition for the removal of an assignee, and for a new choice of assignees, under the following circumstances.

Assignees are not removable, merely because the Commissioners improperly reject the proofs of creditors, who would have been entitled to vote in the choice of assignees, if they had been permitted to prove their debts; unless, indeed, their proofs are fraudulently procured to be rejected.

The fiat issued on the 18th September 1833, and was directed to country commissioners. At the first meeting, on the 10th October 1833, for the proof of debts and the choice of assignees, the total amount of debts proved was only 190*l.* 7*s.* 11*d.* The petitioner was a creditor for the sum of 151*l.* 10*s.* 4*d.*, and made an affidavit of her debt, which was sworn before a Master Extraordinary in Chancery, her residence being at *Scampston* in Yorkshire, 32 miles distant from *Whitby*, where the fiat was prosecuted. Her affidavit was duly exhibited to the Commissioners at the first meeting; but her proof, as well as the proofs of two other creditors, were rejected by the Commissioners, because the Master Extraordinary, before whom the affidavits were sworn, was the solicitor to the commission. The petitioner, and the two other creditors, had also authorized the same solicitor to vote for them in the choice of assignees; but, in consequence of the rejection of their proofs, the solicitor was prevented voting; and *John Hayes* alone was appointed assignee by the votes of creditors, whose debts altogether amounted to no more than 122*l.* 3*s.* The Commissioners were requested to adjourn the meeting for the choice of assignees until the 12th November following, which was the day appointed for the second public

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meeting, as advertized in the Gazette, but they refused to do so.

The petition also impugned the debt proved by *Thomas Hayes*; and therefore prayed that he might be removed, and that another choice of assignees might be directed.

Mr. *Swanston*, for the petitioner. It is very manifest, that the Commissioners were guilty of a gross error in judgment, to reject the petitioner's proof, merely on the ground that the solicitor to the commission was the officer before whom the affidavit had been sworn; and it necessarily follows, that the petitioner must be reinstated in those rights, which she was deprived of exercising by this erroneous judgment of the Commissioners. For, in a case where the major part in value of the creditors were excluded from voting at the choice of assignees, by reason merely of the immense crowd assembled in the room at the time, and there was no blame imputable to any one, yet the Vice-Chancellor for this reason directed a new choice; and his decision was confirmed on appeal by Lord *Lyndhurst*; *Ex parte Dechapeauronge* (a). So where, through the error of the Commissioners, the great body of the creditors were prevented from proving their debts and voting in the choice of assignees, a similar order was made; *Ex parte Hawkins* (b). And in another case, where the Commissioners had improperly rejected the proof of the petitioners to a large amount, whereby two creditors for comparatively trifling sums were enabled to choose the assignees, the like determination was

(a) Mont. & M. 174.

(b) Buck. 520.

come to; *Ex parte Edwards* (a). The right of creditors to participate in the election of assignees, is a legal right; and when they are debarred from exercising it by an error on the part of those, to whom the administration of this branch of the law is intrusted, it is but common justice, that the law should see that no injury is ultimately done to them. It is admitted, that there are some cases at variance with those already cited; but they were all decided by the Court of Chancery, when that Court was so overwhelmed with business, as to induce it to leave as much as it could of the administration of the law of bankruptcy, to the judgment and discretion of the Commissioners. But it is the duty of this Court, constituted as it now is, and having sufficient time on its hands, to review those decisions; for, as regards the abstract right of creditors, there can be no difference in the case, whether they are deprived of that right by error merely, or by actual fraud.

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Mr. *Wright*, for the respondents, cited *Ex parte Butterfill* (b), where it was decided, that the election of assignees must be made by those creditors, however few, who are in a condition to vote: although the creditors not in a condition to vote might have made a different choice; and he also referred to *Ex parte Surtees* (c), and 1 *Mont. & Gregg*, B. L. 352.

ERSKINE, C. J.—I remember a case (d), in which the proof of several debts was rejected, on the ground that the affidavits of debt were sworn, without being upon stamps; and there the choice of assignees was not

(a) Buck. 411.

(b) 1 Rose, 192.

(c) 12 Ves. 10.

(d) *Davis v. Levy*, cor. V. C. August, 1825.

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allowed to be disturbed, although the Court thought stamps not necessary. And I consider it to be a settled rule, that assignees are not to be removed, because the Commissioners improperly reject a proof; unless indeed it appear, that the proof was fraudulently procured to be rejected, with a view to influence the choice of assignees. This is laid down in *Ex parte Durent* (a), and *Ex parte Thompson* (b). In *Ex parte Edwards* (c), and *Ex parte Hawkins* (c), the Court was induced to exercise its discretion on this subject, by the smallness of the amount in value of the creditors who governed the choice, compared with those whose debts were improperly rejected. I think there is no doubt, in this case, but that the Commissioners did wrong in rejecting the proof; inasmuch as, the duty of the solicitor to the commission being to guard against improper proofs, the circumstance of the affidavit of the debt being sworn before him affords the very best protection to the estate.

We are not, however, at present in a situation to decide, whether we will direct a new choice; for the petitioner must first go and prove his debt; and if his proof is rejected, of course the present petition must be dismissed altogether. But my present impression is against opening the choice, and that the petitioner will return here with great peril, as to costs.

Sir J. Cross.—There can be no doubt, but that this Court has absolute power to remove assignees (d), if, in the exercise of its discretion, it shall find due cause for such removal; and, therefore, there is no doubt of our jurisdiction to grant the prayer of this petition. But it is

(a) Buck, 201.

(b) Id. note.

(c) *Vide supra*.

(d) 1 & 2 Will. 4. c. 56. s. 36.

said that we cannot do so on the present occasion, because we are tied up by the former decisions upon the point, which have been cited in the argument. Those decisions are certainly entitled to the highest respect from us all; but are we, in exercising a discretion, to exercise it only under the trammels of precedent? It is said, that a new choice has never been granted, except where there are very peculiar and special circumstances in the case; and in this case are they not very special and peculiar? If the proof, or the evidence on which it was supported, were rejected on a reasonable objection, I admit then it would not perhaps be fair to open the choice. But the objection taken on the present occasion was not only erroneous, but was captious in the extreme; it was upon a mere matter of form, namely, because the affidavit in proof of the debt was sworn before the solicitor to the commission,—the very person who would be most interested in seeing that the proof was right. Well then, the Commissioners, though they saw the great injustice that would be done, by precluding parties from their right of voting,—and although they might have adjourned the choice till the next meeting, so as to have enabled the petitioner to have set right that which the Commissioners only regarded as an error in form,—refuse nevertheless to adjourn the meeting, and suffer the election to proceed, although little, if any, injury to the estate could have happened by this short delay. They then suffer one assignee only to be appointed; which is a very unusual and improvident course for the interests of the creditors. And who is that assignee? Why a party who has proved a debt which, it is now almost admitted, ought to be expunged.

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—
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MILNER.

However desirable it may be to follow precedents, I think we ought not to do so, when it would work a manifest injustice. That it was in our discretion to direct a new choice, on this occasion, is admitted on all hands; and, being thus called on to do an act of justice to this petitioner, my impression is, that if we refuse the prayer of this petition, we shall be really doing him a great injustice.

The multiplicity of the business of the Courts, before which bankruptcy business was formerly transacted, might have justified those tribunals in an unwillingness to listen to applications of this nature. But we sit here for the express and sole purpose of more effectually hearing petitions, and are, in my opinion, bound, if the facts and the justice of the case alike warrant us, to disregard decisions, which perhaps would never have been come to, had there not been a necessity in those Courts to shorten the arguments of counsel, a necessity, which certainly does not appear to exist at present in this Court. Injustice has undoubtedly been done to the petitioner, and other creditors, by the refusal of the Commissioners to admit their proofs; and we are bound to repair the injury, especially as we can also provide against any detriment happening to the estate.

Such are my impressions on the merits of this petition. But it is said, that we cannot at present come to a final decision upon it, as the debt may possibly be rejected. I think, however, that we might make an order declaring that a new choice should take place, if the proof was ultimately substantiated; which would save the parties the expense of coming here again. The same reason does not prevail, as formerly, against opening the choice of assignees; for as a new assign-

ment is not now required, the expense of their removal is comparatively trifling.

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SIR G. ROSE.—The utmost that can be done, upon the present hearing of this petition, is to let it stand over, in order that the petitioner may go before the Commissioners and prove her debt. But, upon the question of merits, I am prepared to say, that there is no case in which assignees already chosen have been removed, merely on the ground that the proofs of creditors have been rejected, because they were tendered in an informal shape, and that the assignees have in consequence been chosen by those creditors who were properly prepared to prove their debts. The practice has been hitherto established, against opening the choice for this cause alone; and it is highly important, in order to know what practice is, that we should abide by that which we find to be settled; so as to avoid the inconvenience arising from a diversity of opinion in matters of frequent recurrence. If the petitioner had even tendered evidence of the consideration for the debt to the Commissioners, and they had rejected the proof, and had proceeded in the choice of assignees, the practice for 20 years has established, that the Court would not, on that ground alone, have opened the proof. Nay, before the former judges by whom the law of bankruptcy was administered, counsel would not, I venture to say, have dared to argue in favour of a petition like the present. In the case before us, there are none of those special circumstances which operated on the minds of the judges, who decided those cases in which the choice has been opened.


If then such would have been the practice, where

1883.

**Ex parte
MILNER.**

the right of the creditor to prove his debt was positively rejected,—*à fortiori*, if the rejection of the evidence of the debt is the only cause for complaint, there is still less reason for opening the choice; although, at the same time, I think it right to add, that, in my opinion, there is no doubt but that the Commissioners were wrong in the objection they took.

It was ordered, that the costs of the assignee should come out of the estate. The petitioner to be at liberty to call a meeting to tender proof of her debt; and if the proof should be substantiated, then that the petitioner's costs of the petition, as well as those of the meeting, should also be paid to her out of the estate. With liberty to apply.



1883.

Ex parte MILLARD.—In the matter of **COOMBS.**Southampton
Buildings,
March 2.

THIS was a petition praying for the confirmation of the Master's report, in which it was found that a party of the name of *Goding*, who had presented a former petition in this matter, claiming as an equitable mortgagee, had no equitable mortgage on the bankrupt's estate.

A party object-
ing to the
Master's re-
port should
either present
a petition
to except to it,
or give notice to
the other side of
the nature of
the objection.

The petition further prayed for the costs of the original petition, as well as those of the inquiry before the Master, and of this application; and that it might be declared that *Goding* was not an equitable mortgagee, and that he might be directed to deliver up the documents in respect of which he claimed the mortgage.

Mr. Montagu, and *Mr. Bethell*, in support of the petition.

Mr. Swanston, contra. One of the commissioners has, in this case, made an affidavit that the report was obtained from the Master by surprise; and I am prepared to contend that the Master has reported erroneously.

Sir G. ROSE.—Have you excepted to the Master's report?

Mr. Swanston.—The attorney thought there was no necessity for excepting; but if the Court think that form essential, I must ask for time.

The COURT thought that the party objecting to the report should have presented a petition to except to

1833.

Ex parte
MILLARD.

it; or at any rate to have given previous notice to the other side of the nature of the objection.

The present petition, however, was allowed to stand over, on an undertaking to furnish the petitioner with a copy of the exceptions that were intended to be taken to the report.

Southampton
Buildings,
March 2.

Ex parte FREDERICK GEORGE RICHARDSON, JAMES SHELDRIK, and JAMES SMITH.—In the matter of HENRY PALMER.

The bankrupt, who was in partnership with *W. P.*, borrowed various sums of him by way of personal loan, and upon the dissolution of the partnership, purchased the stock in trade for a stipulated sum. *W. P.* made out an account entitled, "Mr. *H. P.* (the bankrupt) in account with *H. and W. P.*:" Held, that *W. P.* had a good petitioning creditor's debt, notwithstanding this mode of entitling the account.

THIS was a petition of assignees, praying that the debt proved by the petitioner, *James Sheldrick*, under the fiat, might be substituted for the debt of the petitioning creditor.

The bankrupt and his brother, *William Palmer*, the petitioning creditor, had carried on business in partnership as timber merchants for several years previous to the 30th September 1831, when the partnership was dissolved, and the bankrupt continued the business on his own separate account, and purchased the partnership stock in trade, for which he was charged the sum of 1179*l.* 14*s.* in account by the partnership firm of *Henry and William Palmer*,—as appeared by the books of the partnership, and also by the account exhibited by *William Palmer* to the commissioner, and filed with the proceedings on opening the fiat. The fiat issued on the 10th November 1832. In deposing to his debt before the commissioner on the opening of the fiat, *William Palmer*, the petitioning creditor, swore that the bankrupt was indebted to him in the sum of 2667*l.* 15*s.* 11*d.* for money lent and paid, for

money had and received, and on an account stated between them, which was annexed to his deposition. This account was entitled “ Mr. *Henry Palmer* in account with *Henry* and *William Palmer*,” in which the above sum of 1179*l.* 14*s.* for the partnership stock was one of the first items charged; but there were various others occurring since the dissolution of the partnership, and before the bankruptcy of *Henry Palmer*. When *William Palmer* applied to prove his debt at the public meeting, Mr. Commissioner *Fonblanque* rejected the proof, on the ground that it was a partnership debt due from the bankrupt to the late firm of *Henry* and *William Palmer*; the creditors of which firm, it appeared, were unsatisfied to a considerable amount.

The petition contained the usual allegation that *Sheldrick's* debt, which was proposed to be substituted, amounting to 189*l.* 2*s.* 6*d.*, was incurred not anterior to the alleged debt of the petitioning creditor.

Mr. *Keene* appeared in support of the petition.

Mr. *Anderdon*, for the petitioning creditor, contended that *William Palmer* was a creditor of *Henry Palmer* to a considerable amount on his private account, and that the book-keeper of the parties had sworn that various sums of money had been lent by *William Palmer* to the bankrupt, by way of personal loan, before the partnership expired, independently of those advanced since the expiration of the partnership.

ERSKINE, C. J.—The mixing up all the demands of one brother upon the other in an account wrongly entitled, will certainly not make this a partnership debt.

1839.

Ex parte
RICHARDSON
and others.

1833.

Ex parte
RICHARDSON
and others.

Sir G. ROSE.—Your affidavit shows that the petitioning creditor had a good debt in every respect.

Petition dismissed—the petitioning creditor to have his costs out of the estate, and to be permitted to go again before the Commissioner to prove his debt.

Southampton
Buildings,
March 8.

Ex parte WAKE.—In the matter of BOOTH.

Where an affidavit is reported to be scandalous, the agent in London, who files the affidavit, is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit.

THE petitioner had procured an order to refer an affidavit for scandal, which had been filed on behalf of the petitioner in the original petition in this matter; and Mr. Gregg, the deputy registrar, had reported the affidavit to be scandalous. It appeared, that the affidavit in question had been drawn by a solicitor in the country, and had been filed in the office by one of the clerks of his agent in London; and the object of the present application was to confirm Mr. Gregg's report, to take the affidavits off the file, and that the agent in town should pay to the present petitioner the costs of this proceeding, and those incidental thereto, as between attorney and client.

Mr. Montagu, in support of the motion, cited *Ex parte Kirby*, (a) where a similar affidavit had been made by a clerk of the respondent's solicitor, and the Vice-Chancellor made the order for payment of costs against the solicitor.

(a) Mont. 68.

1833.

Ex parte
WAKE.

Mr. *Parker*, *contrà*, contended that the application ought to have been made against the solicitor himself, as in *Ex parte Simpson*(a), and not against the agent. In this case the country solicitor, who had come to town on the matter of the petition, drew the affidavit himself, which was afterwards filed by his agent's clerk; and *non constat* that the agent knew anything of its contents. There is here a petitioner, and his solicitor; and one only of those two ought to be chargeable for any delinquency of this nature.

ERSKINE, C. J.—I do not see who is to pay the costs in such a case as this, except the agent who filed the affidavit. The doctrine of the Court is, that if any solicitor of the Court file an affidavit which is found to be scandalous, he must pay the costs.

Sir J. CROSS.—We recognize no person here but the agent, who is a solicitor of this Court; and if the country attorney drew the affidavit he will no doubt reimburse the agent.

Mr. *Parker* then contended that the costs should be only common costs, as between party and party, and not costs as between attorney and client.

ERSKINE, C. J.—It would be very hard that the injured party should be made to pay the costs of taking the affidavit off the file, which is found to be irrelevant and scandalous.

Sir J. CROSS.—Filing a scandalous affidavit is a con-

(a) 15 Ves. 476.

1883.

Ex parte
WAKE.

tempt of the Court, and can only be purged by paying costs as between attorney and client.

The Order was therefore made as prayed.

Southampton
Buildings,
March 11.

A libellous hand-bill, published by the bankrupt, against the assignees and the solicitor to the commission, is not a sufficient ground for discharging an order, which allowed the bankrupt to petition in *formâ pauperis*.

A formal objection to a notice of motion is waived, by the party appearing, and requesting further time to oppose it.

Ex parte MORLAND.—In the matter of MORLAND.

THE bankrupt, in this case, had presented a petition in *formâ pauperis*, complaining of the conduct of his assignees, which had stood over to enable him to pass his last examination; and when it came on for hearing, on the 28th November last, his counsel agreed that the petition should be dismissed, but without costs. The bankrupt afterwards, on the 5th February last, obtained an order for restoring the petition to the paper, on an affidavit disclaiming that he had given his counsel any authority to act as they had done.

Mr. Twiss now moved to discharge this order, on the ground that the bankrupt had published a libellous hand-bill against the assignees and the solicitor to the commission, as well as against his counsel; to the latter of whom he imputed bribery, for withdrawing his petition.

Mr. Bethell, and Mr. Sturgeon, took a preliminary objection to the motion, on account of the irregularity of the notice, there not having been two clear days between the day of giving the notice, and that of making the motion; notice having only been given on the Thursday for the Saturday.

The *Registrar*, on being referred to, said that the practice was to give two clear days.

It turned out, however, that Mr. *Sturgeon* had appeared on the motion some days ago, and requested further time to oppose it; upon which

The COURT held the irregularity of the notice to have been waived.

Mr. *Twiss* then resumed his argument in support of his motion. A man, who petitions *in formâ pauperis*, is not entitled to make allegations which any other suitor is prevented from doing. The pauper's conduct has been so vexatious, that the Court ought to dispauper him. In *Corbett v. Corbett*(a) Lord *Eldon* seems to admit, that although a plaintiff cannot be dispaupered in a second suit for vexatious conduct in a former one, yet that he may be dispaupered for vexatious conduct in the same suit. The bankrupt cannot now disclaim the authority of his counsel, to withdraw his petition, and make the arrangement they did on the former occasion. In *Ex parte Green*, where, upon the undertaking of the petitioner's counsel that the petitioner would go in and prove, the Vice-Chancellor ordered the assignees to be removed,—and the petitioner appealing from that decision to the Lord Chancellor, it was objected that the petitioner had acquiesced in the commission, by obtaining the order for the removal of the assignees; Lord *Brougham* thought the objection valid, and that after the undertaking to prove, the petitioner ought not to object to

1833.

Ex parte
MORLAND.

(a) 16 Ves. 407.

1833.

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MORLAND.

the validity of the commission. In the present case before the Court, the assignees have distributed all the funds in the payment of dividends, and the object of the bankrupt is now to throw personally on the assignees the expense of opposing this unfounded petition.

Mr. *Bethell*, and Mr. *Sturgeon*, on behalf of the bankrupt, cited *Furnival v. Boyle* (a), where a counsel having, in the absence of his attorney, acceded to a proposal, upon which an order was made by consent, the attorney's clerk being present, it was held that as the Court would presume it to have been immediately communicated to the attorney, and he did not object to it, the client was bound; but that it might have been otherwise, if it had appeared that there were material circumstances of which the counsel had not been informed, and which were necessary to enable him to exercise a sound discretion. In bankruptcy a petitioner has a right to have his petition reheard *in formâ pauperis*, though it is not so in equity. (b)

Mr. *Twiss*, in reply, said that the bankrupt never gave notice of his dissent from the arrangement made by his counsel in November, when his petition was dismissed, until the 8th February, which was nearly three months afterwards.

ERSKINE, C. J.—It appears to me, that no valid ground has been laid for our discharging this order. If it had been shown, that the order was obtained

(a) 4 Russ. 149.

(b) *Quære tamen*; vide *Beames on Costs*, 128, 129; and *Wild v. Hobson*, 2 Ves. & B. 105.

vexatiously, then indeed we might have discharged it. But the only cause that has been assigned for our doing so is the printed hand-bill, which, it is said, the bankrupt has published against the assignees and his professional advisers. If that is a libel, he may be prosecuted for it; but I think it is no ground for discharging the order.

1833.

Ex parte
MORLAND.

The rest of the COURT concurring,

The motion was refused.

The petition of the bankrupt, however, was on this April 16. day dismissed, on account of his great delay in presenting it.

MEMORANDUM.

IN the course of Easter term 1833, *David Pollock, Philip Courtenay, John Blackburne, and William Henry Maule*, Esquires, having been appointed his Majesty's counsel learned in the law, took their seats accordingly within the bar.

In the matter of CRAWLEY.

THIS was the petition of the petitioning creditor, for permission to issue a new fiat, the present one not having been opened, and the time for opening it expiring to day; it having been issued on the 3d April. The ground of making this application was, that since the fiat was issued, namely, on the 15th April, the

Westminster,
April 17.

A new fiat issued on the application of the petitioning creditor, to give effect to a more recent act of bankruptcy; the time for opening the first fiat not having expired.

1833.
 ———
 In re
 CRAWLEY.

bankrupt had committed a clear act of bankruptcy, by absconding from his dwelling-house, while that on which the present fiat was founded, might prove somewhat equivocal; and the petitioning creditor therefore wished to be secure as to the act of bankruptcy.

Mr. *Montagu* appeared in support of the petition.

The COURT, under these circumstances, ordered the present fiat to be annulled, and that a new one might be issued.

Westminster,
 April 17, 18, 19,
 and July 1.

Ex parte ANN HARWOOD.—In the matter of WILLIAM TERRY and JOHN TERRY.

On a petition by a creditor to supersede, on the ground of concert, before the passing of the Bankruptcy Court Act, the Lord Chancellor had directed an issue; which was found in favour of the commission. The assignees then presented a petition for their costs, and the creditor a petition for a new trial. Upon the hearing of these petitions, the Court of Review, being satisfied of the fact of concert, thought no new trial was necessary, and ordered the commission to be superseded. *Dissent.* Sir J. Cross.

THIS was the petition of a creditor for the new trial of an issue, which had been directed to try the validity of the commission. The facts under which the petition was presented were as follows:—

The commission issued against the bankrupts in September 1829. On the 14th November 1829, the petitioner, *Ann Harwood*, who was a creditor for 100*l.*, petitioned to supersede the commission, on the ground of concert; alleging, that such concert was admitted by the petitioning creditor to Mr. *Hardy*, the solicitor of *Ann Harwood*, and also to other persons. This petition was supported by an affidavit of *Hardy*, as well as by those of several other persons, among others, *Charles Hicks*, and *Edward Webb*. In January 1830,

thought no new trial was necessary, and ordered the commission to be superseded. *Dissent.* Sir J. Cross.

But see the next case.

In order to fix the executor of the petitioning creditor with costs, the petition must pray costs against him in his character of executor.

the petition was heard before the Vice-Chancellor; when it was ordered, that the parties should proceed to a trial at law on the following issue, namely,—
 “Whether the commission issued against the bankrupts was a commission concerted between the petitioning creditor and the bankrupts, or either of them;” in which issue *Ann Harwood* was to be the plaintiff, and the assignees defendants. And it was further ordered, that either party, as well plaintiff as defendant, should be at liberty to examine the bankrupts at the trial of the said issue, and also all or any of the other persons whose affidavits had been filed; and that all further directions and costs should be reserved until after the trial, and that any of the parties might be at liberty to apply to the Court.

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 Ex parte
 HARWOOD.

On the 6th April 1830 this issue was tried at Taunton assizes before Mr. Justice *Bosanquet*; when Mr. *Erskine* (a), the counsel for the plaintiff, called *Charles Hicks*, and proposed to examine him in support of the plaintiff's case, as to a certain verbal admission alleged to have been made by one of the bankrupts after the issuing of the commission, which the Judge, however, refused to receive in evidence; whereupon Mr. *Erskine* elected to be nonsuited.

On the 22d April 1830, *Ann Harwood* presented another petition to the Lord Chancellor, praying for a new fiat, and that the assignees might be restrained from entering up judgment on the nonsuit; which petition was heard before the Vice-Chancellor in June following, and dismissed with costs.

A petition of appeal to the Lord Chancellor was

(a) The present Chief Judge of the Court of Review.

1833.

Ex parte
HARWOOD.

presented by *Ann Harwood* against this decision, which was argued on the 23d and 24th August 1831; when his Lordship ordered, that on the solicitor of *Ann Harwood* giving to the assignees his undertaking to be personally responsible to them for the costs of the former trial and of that application, a new trial of the issue directed by the Vice-Chancellor should be had; and that so much of the Vice-Chancellor's first order, as directed that the bankrupts should be examined, should be varied, by directing in lieu thereof, that the defendants should call the bankrupts on the trial, and should examine them on such trial, as also *Richard Elsee* the solicitor. And his Lordship confirmed the first order of the Vice-Chancellor in all other respects, reserving all costs, and giving liberty to either party to apply.

In August 1832, the new trial was had before Mr. Justice *Patteson*, at the assizes for Somersetshire, when a verdict was given for the defendants (the assignees), the jury finding that the commission was not concerted, and the judge stating that he perfectly agreed with the jury. *Charles Hicks* was not examined as a witness on this trial, although he was present in Court at the time; and when the petitioning creditor was called, his evidence being as to conversations that took place between himself and the bankrupt after issuing the commission, the counsel for the assignees objected that it could not be received, and it was accordingly rejected by the judge.

On the 29th January 1833, the assignees presented a petition to the Court of Review, praying that *Ann Harwood* and her solicitor might be ordered to pay the assignees their costs; which petition came on to be

heard on the 22d February 1833; when the Chief Judge observing that he thought justice could not be done, unless *Charles Hicks* was examined upon oath, the counsel for *Ann Harwood* requested that the petition might stand over, to enable her to present a petition for a new trial. This was objected to by the counsel for the assignees, who urged that *Ann Harwood* might have called *Charles Hicks* at the trial, if she had chosen, but that she had not thought fit to do so. The Court, however, ordered the petition to stand over.

1833.

Ex parte
HARWOOD.

On the 5th March 1833, *Ann Harwood* presented this petition to the Court of Review for a new trial, and praying that the record of the issue might be so varied, that the intent of the Court of Review to ascertain all the facts might not be defeated; and that the bankrupts, the petitioning creditor, and *Charles Hicks*, might be examined on such trial.

Upon the petition being called on,

Mr. *Bacon* and Mr. *Bethell*, who appeared for the assignees, took a preliminary objection to it, on the ground that a new trial could only be moved for before the judge who directed the issue (a).

Mr. *Blunt*, for the executor of the petitioning creditor. The Lord Chancellor refused the very same thing now asked by the present petition; so that this application is substantially an appeal from the judg-

(a) When a Court of Equity directs an issue, the new trial must be moved for before the Court which directed the issue; when it directs an action to be brought, the motion must be made in the Court in which the action is brought. *Carstairs v. Stein*, 4 M. & S. 192. And see 47th Gen. Order, 3rd April 1828; *Pemberton v. Pemberton*, 11 Ves. 50; *Ex parte Barker*, 1 Cox, 419; *Fowkes v. Chadd*, Dick. 576.

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HARWOOD.

ment of the Lord Chancellor, which this Court has not the power to entertain.

Mr. *Ellison*, on behalf of the solicitor for the petitioning creditor, urged similar arguments in support of the objection.

Sir J. Cross.—The prayer of this petition asks for a new trial, and that the record may be varied. Now, if the record is varied, it would not be a new trial. But the question is, whether this Court cannot grant a new issue, if it thinks proper? (*a*)

Sir G. Rose.—We are bound to hear this petition, both in respect to further directions under the original orders, and also with regard to the application now before the Court.

Mr. *Swanston* and Mr. *Montagu*, in support of the petition. The only question is, whether the conscience of the Court is satisfied with the result of the decision of the issue at law. Now the most essential evidence has been excluded by the Court of *Nisi Prius*, by the rejection of that admission of *Ellen* the petitioning creditor, and the omission to examine *Charles Hicks*, who was expressly ordered to be examined by the Vice-Chancellor, when he granted the issue.

Mr. *Blunt*, for the executor of the petitioning creditor, (who had died after the issuing of the commission,) went into the whole facts of the case, and contended that the Court ought not to grant a new trial, there having already been two trials at *nisi prius*.

(*a*) See *Cockburne v. Hussey*, 2 Ridg. P. C. 504; *White v. Lisle*, 3 Swanst. 357.

Mr. *Bacon* and Mr. *Bethell*, for the assignees, argued to the same effect.

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Ex parte
HARWOOD.

Mr. *Swanston* was heard in reply.

Cur. adv. vult.

Sir J. CROSS.—The original petition in this case prayed a *supersedeas*, on the ground of alleged collusion between the petitioning creditor and the bankrupts. It appears, that the bankrupts had carried on the business of ironmongers at Bath, and that the petitioner *Ann Harwood* was formerly their servant, and is now an aged woman, and a pauper receiving parochial relief; though at the time of the bankruptcy a considerable sum was due to her for wages. The bankrupts, about four years ago, having become embarrassed in their circumstances, applied to their solicitor in their difficulties, and also consulted the solicitor of their principal creditors as to the best course to be adopted. A composition of 8s. in the pound was offered, but unfortunately rejected; upon which it was agreed to strike a docket against them. For this purpose they were asked to whom they owed 100*l.*, the amount necessary to constitute a petitioning creditor's debt. They said they were indebted in that amount to Mr. *Ellen*, a particular friend of theirs, and much interested in their welfare. They were extremely averse to appearing in the Gazette; and at a meeting of their creditors they implored of them not to proceed to that extremity. A commission was however issued against them, without the bankrupts being informed of the circumstance; assignees were ap-

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Buildings,
July 1.

1833.

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HARWOOD.

pointed, and Mr. *Ellen* appeared as the petitioning creditor. Shortly afterwards, Mr. *Webb Hardy*, a solicitor, also residing at Bath, and who had formerly been employed in other business by Mr. *Ellen*, but was not engaged in this transaction, met that gentleman, and procuring as much information as he could on the subject, drew up an affidavit, on which to found proceedings for a *supersedeas*; but which affidavit Mr. *Ellen* declined to swear to, it being concocted by *Hardy* himself. At this time Mr. *Hardy* had no client whatever who was connected with the estate; but being incensed that he was not employed in this business by his former client, in preference to another solicitor, he got a decrepid old woman of 70 years of age to aid him in this vindictive proceeding. She put her mark to a paper investing Mr. *Hardy* with the necessary authority; and she now swears in her affidavit that she did not know a particle of its contents, and that she was only told that if she signed it she would get her money. This solicitor was a volunteer in the business, and followed up this proceeding for the sake of the costs; and I think it would be a gross injury to the petitioning creditor, and all the other creditors, to supersede this commission. After the petitioner *Ann Harwood* had on the first trial submitted to a nonsuit, the issue was again tried before a special jury of the county of Somerset, and the learned judge and the jury decided that this was not a concerted commission. In that opinion I perfectly coincide; and I cannot see why this Court should go out of its way to differ from the jury, and gratify the enmity of this prosecutor; which, as it appears to me, instead of doing justice, would be to countenance

a flagrant wrong. I cannot but come therefore to the same decision which the Vice-Chancellor came to on a former occasion, and think that the petition for a new trial should be dismissed with costs.

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HARWOOD.

Sir G. ROSE went fully into the affidavits filed in support of the original petition of the 14th November 1829, and particularly an affidavit by *Hardy*, as to a statement made by the petitioning creditor to him after the issuing of the commission,—and also the affidavits of *Charles Hicks* and *Edward Webb*, as to circumstances therein deposed to, which were stated to have occurred also after the commission was issued. His Honor then added, that he had the misfortune to differ from his learned colleague in the view he took of this question; for he thought, that the fact of concert between the petitioning creditor and the bankrupts had been clearly proved. This being so, he was of opinion that no new trial, nor indeed any further inquiry, was in the slightest degree necessary; but that the commission ought at once to be superseded.

ERSKINE, C. J.—I had hoped that it would have been unnecessary for me to interfere on this occasion; but, from the difference of opinion which exists between my learned colleagues, I find it imperative on me now to do so. As I was counsel in this case, when it was argued before another tribunal, I cannot but feel some dread of being influenced by a partial leaning towards that side of the question, which it was formerly my duty to support; but I will endeavour to come to an unbiassed decision, by dismissing, as well as I can, from my mind all former impressions. I have given the case a careful

1833.

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HARWOOD.

and impartial consideration, and have paid the utmost attention to the arguments that have been adduced both on the one side and the other. It has been suggested, that it is not *Ann Harwood*, but the solicitor, *Mr. Webb Hardy*, who is the party really before the Court; and if this had been proved, it would certainly have been a good reason for dismissing her petition with costs. Nevertheless, I cannot but think it would be a great injustice to do so in the present stage of the proceedings; as no evidence whatever has been offered to prove that the parties were unfairly before the Court. It has been urged also by the counsel for the assignees, that superseding this commission would be of service to no one; but it must not be forgotten, that we sit here not to consider only individual hardship or interest, but on grounds of public policy to administer the law as we find it. The law says, that a commission, which is sued out at the instigation and in concert with the bankrupt, shall not be permitted to stand. It appears that *Ellen*, the petitioning creditor in this case, evinced great friendship for both these bankrupts, and sued out a commission, to induce the creditors to come into the terms of a composition. Now, although the threat of a creditor to sue out a commission against an insolvent person, to effect such a purpose, might not be illegal,—yet if a friendly commission be issued by a friendly creditor, to keep back a hostile commission of hostile creditors, I am of opinion, that such friendly commission is clearly illegal. It is very true, that both these bankrupts were extremely averse to a commission being issued against them; and it was even sworn in their affidavits, that one of them went down on his knees, and with tears in his eyes implored of his cre-

ditors not to proceed to that extremity; but it would seem, that their only dread was the appearance of their names in the Gazette. They had no objection to the commission being worked up to a certain extent, but they wished it to stop when their difficulties were on the verge of gaining publicity. Now the rule laid down by one of the greatest judges that ever sat on questions of this kind—I mean Lord *Eldon*—was, that whenever a commission was concerted between the petitioning creditor and the bankrupt, it should be superseded. And as this appears to me a case to which the rule is especially applicable, I think we are bound to enforce it in the present instance.

1833.

Ex parte
HARWOOD.

Mr. *Blunt*, on behalf of the executor of the petitioning creditor, then submitted that the Court had no power to order the executor to pay costs, without a petition of revivor; as the case of *Jupp v. Geering* (a) had decided, that in proceedings in equity the costs are lost by the death of either party before taxation.

In order to fix the executor of the petitioning creditor with costs, the petition must pray costs against him in his character of executor.

Mr. *Swanston*, *contra*.—The objection has been waived by the appearance of the executor, who has throughout these proceedings placed himself in the position of the party for whom he acted as the representative.

Erskine, C. J.—There is no petition praying costs against the representative.

Mr. *Swanston*.—No, that is admitted; for the death of the petitioning creditor was not known when this petition was filed.

(a) 5 Mad. 375.

1833.

Ex parte
HARWOOD.

Sir *G. Rose*.—Have you brought the executor before the Court by any petition in the nature of a petition of revivor?

Mr. *Swanston*.—By an amended petition, which brought the whole matter before the Court, and which was for a new trial, not for a supersedeas.

Mr. *Blunt*.—This amendment was made by the Court on the 3d April last, when the executor did not appear.

Sir *G. Rose*.—How can you claim costs against the representative of the petitioning creditor, without any thing to that effect in the prayer of the petition?

Mr. *Swanston*.—The Court would make an order on the petitioning creditor, if he was alive, without his appearance, after he had been duly served with the petition; and he has now been fully heard by the counsel for his representative. And although the executor is not brought here strictly conformable to the regular practice, yet appearing, as he has done throughout these proceedings, in the character of the legal representative of the petitioning creditor, he is as much amenable to any order the Court may pronounce with respect to the costs, as the petitioning creditor himself would have been.

The COURT thought, however, that as no costs had been prayed in the original petition against the representatives of the petitioning creditor, and as the only costs which the Court intended to give were costs upon that petition, the executor would not in this case be liable for the costs.

The Order finally made was, that the commission

should be superseded with costs, together with the costs of the original petition, the expenses of the supersedeas, and all incidental charges thereon.

1833.

Ex parte
HARWOOD.

Ex parte KEYS and others.—In the matter of
WILLIAM TERRY and JOHN TERRY.

1834.

Lincoln's Inn
Hall,
March 22.
Cor. Lord
Chancellor.

THIS was a petition of appeal to the Lord Chancellor, from the decision of the Court of Review in the last case; which, after stating the facts as there detailed, proceeded to allege that the petitioners were aggrieved by the Order of that Court, inasmuch as the Vice-Chancellor, and the Lord Chancellor, having refused to decide on the original petition presented by *Ann Harwood* for superseding the commission, without an issue, the Court of Review had no jurisdiction to make the order it did in the last case. It further alleged, that the petitioners were also aggrieved, because, in making such order, their Honors relied on the affidavits filed by *Ann Harwood* in support of the original petition, and admitted the depositions thereby made of alleged facts and circumstances, which, inasmuch as the same were therein stated to have occurred after the issuing of the commission, ought not to have been admitted in evidence for the purpose of superseding the commission; and in particular, because their Honors relied on the affidavit of *Charles Hicks*, notwithstanding *Ann Harwood* had abstained from calling him as a witness at the trial of

Where, on a petition to supersede, the Lord Chancellor had directed the trial of an issue, and the verdict was in favour of the commission:—Held, that the Court of Review could not supersede the commission, on a petition for costs, and a cross petition for a new trial.

The Lord Chancellor has still a substantive control in cases of supersedeas or annulling a fiat, although the question may not come before him by way of appeal.

Where a party obtains an order of the Lord Chancellor to hear an appeal on petition, instead of on special case, and the order is im-

properly obtained. the respondent must move to set it aside, and not wait to make his objection to the form of proceeding until the petition is called on for hearing.

Whether the matter appealed against be one of law, or fact, the Lord Chancellor will not determine before he hears the petition through.

1884.

Ex parte
Keys
and others.

the issue ;—and that, inasmuch as the Court of Review had no jurisdiction to make such order, the petitioners had been advised, and submitted, that the same ought to be appealed against and heard before the Lord Chancellor on a petition of appeal, and not on a special case.

The petitioners then prayed, that they might be at liberty to present their petition of appeal from the said order of the Court of Review, and that the Lord Chancellor would be pleased to receive and answer the present petition, and to direct that the petitioner might serve it on *Ann Harwood*, and all other necessary parties, as a petition of appeal from such order ; and that thereupon all the matters aforesaid might be reheard and reviewed by the Lord Chancellor ; that the order so made by the Court of Review might be reversed, and that the prayer of the petition presented by the petitioners on the 29th July 1833, (a) might be granted ; that the petition presented by *Ann Harwood* to the Court of Review, on the 5th March 1833, (b) might be dismissed with costs ; that the commission might be proceeded with, and that a writ of *procedendo* might issue for this purpose ; and that the petitioners might be at liberty to take all their costs of this application, &c., occasioned by the order of the Court of Review, out of the estate of the bankrupts.

Mr. *Swanston*, and Mr. *Montagu*, who appeared for the respondent, took a preliminary objection to the hearing of this petition. The question raised by it being entirely a question of *fact*, namely, whether or not the commission was concerted, was consequently not the subject of an appeal, within the provisions of

(a) See last case, *ante*, p. 252.

(b) See *ante*, p. 253.

the 1 & 2 Wm. 4, c. 56. s. 3., which limits the right of appeal to "matters of law and equity, or on the refusal or admission of evidence *only*." In *Ex parte Hinton* (a), it was decided by the Court of Review, that an appeal to the Lord Chancellor does not lie, where the point determined is a mere matter of fact, but only where it involves a matter of law or equity, or is connected with the refusal or admission of evidence; and that where the question was, whether the party was or was not a trader, that was not the subject of an appeal. The order also to hear this matter *on petition*, and not on a special case, was obtained *ex parte*.

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The *Solicitor General*, *contra*, said, that the order to hear *on petition* having been regularly obtained, the proper method of proceeding, if the other side objected to such order, would have been to move, on notice, to quash the order for a hearing on petition.

Mr. *Swanston*, in reply. The appeal in this case being on matter of fact, and having been brought before the Court in an irregular form, the Court ought at once to refuse hearing the appeal, without imposing on the respondent the necessity of moving to rescind the order. It is not denied, that the Lord Chancellor has power to hear any appeal in bankruptcy on petition, but the difficulty was, how the Lord Chancellor's opinion was to be formed, as to the propriety of hearing an appeal on petition. This difficulty is removed by the case of *Ex parte Hinton* (a), where the Lord Chancellor decided, that the facts stated in the petition in that case were not sufficient to bring it within

(a) 2 Dea. & Ch. 407.

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the 3d section of the Bankruptcy Court Act, which gives the Lord Chancellor power to direct an appeal to be otherwise than by special case. In the present instance, the order should not have been obtained, without notice to the respondent.

Lord BROUGHAM, C.—I think it is now too late to object to the form, in which this appeal is brought before me; not because the order has been already made,—for all *ex parte* orders are *periculo petentis*,—but because the respondent was, in fact, on the 9th November last served with the order of this Court for the hearing of this appeal on petition; and if there was any objection to that form of proceeding, the respondent should have moved to discharge that order. To prevent, however, all doubt in future as to the practice on questions of this nature, it may be as well at once to lay down a rule to be observed hereafter on such occasions :—

Let the appellant, therefore, apply *ex parte* to have the matter heard on petition, and let the respondent subsequently move to set the order aside, if improperly obtained.

This will prevent the necessity of going twice through the same cause.

With respect to the other objection, that this is a matter of fact appealed against, and not one of law, or equity, or of evidence, the act is no doubt imperative. The words, “ except the Lord Chancellor shall in any case otherwise direct,” were not added in the 3d section of the act, to enable the Chancellor to hear any matter *merely* of *fact* on petition; but because it might sometimes happen that the *law* and *fact* of a

case might be so blended, as to render it impossible to sever them. An appeal of this description, therefore, the Lord Chancellor may, if he thinks it expedient, direct to be heard by petition. The question is, then, whether this appeal is on a matter of *law*, or of *fact*. And I think it is impossible to determine this question, unless I hear this petition through.

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The *Solicitor General*, Mr. *Knight*, Mr. *Ellison*, Mr. *Bethell*, and Mr. *Bacon*, who appeared for the different appellants, then stated the following as the grounds of the appeal.

1. The Court of Review has wholly disregarded an order of the Vice-Chancellor in this matter, as well as another order made by the Lord Chancellor confirming the Vice-Chancellor's order.

2. That Court has taken upon itself to supersede a commission, on a petition, which contained no prayer for a supersedeas.

3. The supersedeas itself was contrary to the provisions of the act of parliament.

With respect to the *first* ground of appeal, viz. that the Court of Review has wholly disregarded the two orders made in this matter by the Vice-Chancellor, and the Lord Chancellor,—the question is, whether that Court can act as a Court of Appeal from the orders of the Lord Chancellor, or Vice-Chancellor. Upon two several occasions, when the matter came before this Court, the Vice-Chancellor and the Lord Chancellor decided, that the only question was, whether the commission was concerted or not, and that this was a point which could not be decided on by affidavits; they therefore directed an issue to ascertain that fact. But

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these two decisions of a superior Court the Court of Review has treated as perfect nullities, when it had no power whatever to adjudicate, except on the matters included in the issue, or touched by the verdict.

2dly. The Court of Review has also superseded this commission, on a petition which contained no prayer for a *supersedeas*. This the Court had no authority to do; or even if it had, it is contrary to every day practice, to make an order on a matter not included in the petition. There were two petitions before the Court of Review;—one by the assignees, praying the costs of the anterior proceedings,—and a cross petition by *Ann Harwood*, for a new trial of the issue directed by the Lord Chancellor. The Court of Review, however, gave no costs, nor granted any new trial, but made a gratuitous order for superseding the commission.

3dly. The *supersedeas* was contrary to the act of parliament, being grounded on the fact of concert. For the 1 & 2 Wm. 4. c. 56. s. 42. expressly declares, “that from and after the passing of this act, no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them; save and except where any petition to supersede a commission for any such cause shall have been already presented, and shall be now pending.” [Lord *Brougham*, C. There is no question that a commission cannot now be superseded for concert, unless a petition for that purpose was presented before the passing of the act, and was then pending. But the present case falls within that ex-

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ception, as the first petition was presented long before the act passed, and was ordered to stand over until after the trial. Still, however, should not the matter have been brought on for further directions in this Court? (a) How came this petition before the Court of Review? [Mr. *Swanston*. It was carried there by an order, transferring it to that Court (b). The same circumstance occurred in *Ex parte Christie*.] (c) The omission to examine *Hicks* as a witness on the trial, has been assigned as a reason for superseding this commission. But the bankrupt was examined, and the other side might have called *Hicks*, if they had thought proper to do so. So that the Court of Review partly formed its judgment in favour of the petitioner, *Ann Harwood*, on her own neglect to examine this witness, whose evidence was supposed to be so material in the decision of this question.

Mr. *Swanston*, and Mr. *Montagu*, for the respondents.
—When an issue is directed, and the verdict on the issue is canvassed by the Court on further directions, the verdict is not binding on the Court. For the object of an issue is to satisfy the conscience of the Court; and, therefore, when the matter comes again before it on further directions, the Court reviews not only the evidence which was adduced at the trial of the issue, but also that which was originally before it

(a) See the Vice-Chancellor's judgment in *Ex parte Langston*, 1 Dea. & Ch. 336, from which it would seem, that the matter was properly brought before the Court of Review for further directions.

(b) By a general order of the Court of Review, made Jan. 16, 1832, all petitions then depending before the Lord Chancellor in matters of bankruptcy, were allowed to be set down for hearing in the Court of Review, upon motion made for that purpose. See ante, Vol. I. Appendix, xxxi.

(c) 2 Dea. & Ch. 461, 465.

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when the issue was granted. And if the conscience of the Court be not satisfied with the result of any inquiry it has directed—whether it is a reference to a master, or in the shape of an issue to be tried by a jury, or even of a case sent for the opinion of a Court of law, *Utterson v. Vernon* (a), *Hampson v. Hampson* (b), the Court will in any of these cases overrule the finding. In *Stace v. Mabbot* (c) Lord *Hardwicke* refers to a remarkable case which occurred before Lord *King*, where five successive verdicts were given in favour of the validity of a deed alleged to have been forged; and yet Lord *King*, not being satisfied with the verdicts, overruled them all, by ordering the deed to be cancelled. [Lord *Brougham*, C. A measure like that, however, is only pursued, when the circumstances are such, that the Court is resolved to adopt no verdict but a particular one. In the case mentioned by Lord *Hardwicke*, it would have been better if Lord *King* had exercised the moral courage to declare so at once (d).] There can be no doubt that the Court of Review had in this case jurisdiction to supersede. Could not the Lord Chancellor have adjudicated on the matter, in the face of the verdict, if the case had come back to him after the trial of the issue? And has not the Court of Review an equal authority, when

(a) 4 T. R. 570.

(b) 3 Ves. & B. 42.

(c) 2 Ves. 554.

(d) Lord *Hardwicke*, in alluding to this case, says, that the case was “twice or thrice tried at common law,” which must have been in an action of trespass or replevin, and before the bill in equity was brought to set the deed aside for forgery. Lord *King* then directed an issue, and Lord *Hardwicke* adds, “I believe there was a new trial after that;” so that it does not, with any degree of certainty, appear, that Lord *King* actually sent the case for trial more than once; and it would have required no small degree of moral courage in him to have overturned, on the very first hearing of a case, two or three previous verdicts of a jury.

the act of parliament (a), which constitutes that Court, confers upon it the same power and jurisdiction in bankruptcy as was previously exercised by the Lord Chancellor?

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Lord *Brougham*, C. Of the power, there is no doubt, but it is only exercised under very special circumstances, such as a miscarriage of the jury, or from matter collected from proceedings which were not before the jury. This Court does not, in general, ask the opinion of a jury, and afterwards treat it as a nullity. I have now heard enough of this case, to decide, that it is fit to be brought before me on petition, and not on special case. For many weeks might have elapsed, before the parties could have agreed upon the facts, in order to settle the special case; and then all the judge's notes on the trial must have been embodied in the case.

Mr. *Swanston*, and Mr. *Montagu*, in continuation.
—The present case has been brought on by petition, for the purpose of obtaining indirectly the opinion of this Court on a plain matter of fact. It is not, therefore, the proper subject of an appeal. The question is purely, whether or not this commission was concerted; and it is disguising the question, to say, that any matter of law is involved in it. [Lord *Brougham*, C. It has been said, that the Court of Review went partly on the ground that *Hicks* was not examined as a witness on the trial. How is that fact? For it would be a *non sequitur*, that because *Hicks* was not examined, the commission must therefore be superseded. That would indeed be rather a reason for a new trial.]
When the petition of the assignees was presented for

(a) 1 & 2 Will. 4. c. 56. s. 2.

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payment of their costs, one of the Judges of the Court of Review asked whether *Hicks* was examined at the trial, and declared, that if he had not been examined, no costs would be given. The petition then stood over, and in the meanwhile a new petition was presented by *Ann Harwood* for a new trial. The order for the supersedeas does not rest on the fact that *Hicks* was not examined, but this circumstance merely weighed against allowing the assignees their costs. On the merits of the case, if they can be taken into consideration, it is submitted that this Court will confirm the judgment of the Court of Review, which is in furtherance of, instead of overruling, the orders of the Vice-Chancellor and the Lord Chancellor.

The *Solicitor General*, in reply. The Court of Review had no right, after the trial of an issue which had been ordered by the Lord Chancellor, and at which witnesses were examined *viva voce*, to revert to the affidavits filed on presenting the original petition, and utterly disregard the verdict given on the trial of the issue. [Lord *Brougham*, C. If the Court of Review, after looking at the evidence adduced at the trial, perceived that it would lead to a conclusion one way, though the jury had found a verdict the other way, might not that Court have done, what this Court could no doubt have done in the like instance, namely, act upon the evidence in the teeth of the verdict?] The Court of Review has decided on the affidavit of *Hicks*, which stated facts not admissible in evidence, occurring as they did after the issuing of the commission. One of the Judges also declared that he decided, on the ground that *Hicks* was not examined at the trial; when

it is plain, that his evidence *vivâ voce* would have been as inadmissible as his affidavit. [Lord *Brougham*, C. Might not *Hicks* have been produced to prove, that the bankrupt had given a different account to him after the bankruptcy, from that which the bankrupt had sworn to as having passed before his bankruptcy? This would have merely gone to discredit the bankrupt's testimony, and would not have been substantive evidence of facts declared by a bankrupt after his bankruptcy.] There is another ground of appeal, however, which is this,—that the Court of Review has taken upon itself to *supersede* the commission, when no power whatever to do so is given it by the act of parliament, the 19th section of the act reserving all power of annulling fiats solely to the Chancellor.

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Mr. *Swanston* said, that that objection was entirely removed by the Lord Chancellor confirming the order for the *supersedeas*.

Cur. adv. vult.

LORD BROUGHAM, C. now delivered his judgment as follows.—The words of the act, it is quite clear, exclude appeals on matter of fact, and confine them to matters of law or equity, or on the refusal or admission of evidence. I am inclined to think, that the Court of Review has in the present instance made an order at variance with the previous orders of the Vice-Chancellor, and of this Court. My judgment, however, does not turn on this, although it may have influenced me in deciding that this matter might be brought before me *otherwise* than on a special case. It appears, that

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the Vice-Chancellor, after the nonsuit on the first trial of this issue, refused a new trial; and that, on an appeal from his decision, I ordered a new trial. If my order was perfectly executed, the verdict ought to have been satisfactory; but if imperfectly, I think that the prayer of the original petition ought not to have been granted; and if the result of the trial was unsatisfactory to the Court of Review, they should have ordered a new trial, and not have superseded the commission; and even if the trial had been satisfactory, that Court had no power to order the supersedeas. It is not the practice of a Court of Equity, in general, to decide against a verdict, though in extreme cases the Court might certainly so decide; and I do not mean to deny, that the Court of Review has not in this respect an equal power with a Court of Equity. It is a material circumstance, however, that the Court of Review acted on an order that originated in this Court. Now, that being the case, I think the further acts of the Court of Review should have been grounded on the order of this Court, and not in opposition to it. There is reason also to believe, that the judgment of the Court of Review proceeded on circumstances arising after the bankruptcy, which were not admissible in evidence. I do not lay great stress on that fact; still, for any thing I can discover, they superseded on evidence that was not before the jury, at the trial.

The counsel for the respondents have in an ingenious argument endeavoured to show, that the order of the Court of Review was reconcileable with the previous order of this Court, and that that Court proceeded on the evidence furnished by the new trial,—that they had a right, if they chose, to disregard the

verdict,—that this Court might have been induced to supersede, if the same matter had been before it,—and that, consequently, whether the Court of Review was right or wrong in superseding, is a matter of fact, and not of law or equity, and therefore not subject to appeal. It was further contended, that as this Court, when the original petition was before it, had the right to supersede, so the Court of Review had an equal right when the petition was brought there; and that the Court of Review very probably assumed, that this Court would have superseded without further inquiry; which was also a question of fact, and not one of law. In deciding, however, whether or not the order made by this Court has been departed from, I must not be influenced by such nice calculations of possibilities and probabilities; but I am bound to look at the state of circumstances as they exist. I feel myself called upon also to consider this case in another point of view, without regard to the question, whether this be a matter of law, or fact. By the 19th section of the Bankruptcy Court Act, the Lord Chancellor has reserved to him the whole power of annulling any fiat; the Court of Review has, in fact, no authority of itself to supersede or annul a fiat, though it makes an order to that effect; but it is the Lord Chancellor, by whom the supersedeas is issued; he it is, also, who issues the fiat; and his authority in this respect is not controlled by any of the provisions of the act of parliament. The former power of the Lord Chancellor is not taken away by the 19th section; but it merely gives him a new mode of exercising it, and declares that the order for annulling a fiat shall have all the force and effect of the former writ of supersedeas. Every thing else

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remains just as it was, the Great Seal alone being left the control in cases of supersedeas. I therefore think, that this Court is clearly entitled to entertain the question on this appeal; and that the order of the Court of Review must be reversed. I observe that the last petition of *Ann Harwood* prays for a new trial; this, it is highly probable, may still be ordered by that Court.

The Order made was, that the order of the Court of Review should be reversed, and that the assignees should be permitted to take their costs out of the estate. The costs of all other parties to be reserved.

Ex parte JOHN HOLDER.—In the matter of JOHN
HOLDER.

Westminster,
April 27, 1833.

A bankrupt did not disclose a life-interest which he possessed in certain property, when he passed his last examination; and after the lapse of more than twenty years, when four of the Commissioners were dead, he petitioned for a fiat to be issued to fresh Commissioners, and that the assignee might be ordered to account.

THIS was the petition of the bankrupt for a new fiat to be issued, under the following circumstances, as stated in the petition.

The commission issued on the 12th February 1811, directed to five Commissioners at Hull, four of whom were since dead. The amount of the debts proved under the commission was 1558*l.* 11*s.* 6*d.*, upon which only one dividend had been paid of 3*s.* 6*d.* in the pound. The bankrupt was, at the time of his bankruptcy, tenant for life of certain freehold and copyhold property in Yorkshire, subject to two mortgages thereon, one for 350*l.*, and the other for

The Court, under these circumstances, allowed the bankrupt to issue a new fiat in the name of a creditor, but thought that, after this concealment, he was not entitled to an inquiry against his assignee.

The Court will not take a trust deed out of the possession of the bankrupt's trustees.

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3600*l.* This property, which came to the bankrupt's wife under her father's will, was, by indentures of lease and release, dated the 1st and 2d March 1804, and a fine previously levied, conveyed to trustees, in trust for the bankrupt during the joint lives of himself and his wife, without impeachment of waste,—with remainder to the survivor, without impeachment of waste, for life,—with remainder to the children of the marriage, as therein mentioned. The petitioner stated, that the whole of this property was, at the time of the death of the father of the bankrupt's wife, of the computed value of 4000*l.*; and that her father also bequeathed to her personal property to the amount of 4000*l.*, the half of which the bankrupt had, since her father's death, expended in the improvement of the freehold property. By the same indentures two several sums of 3000*l.* and 600*l.* were secured to the trustees, as a provision for *Mary Ann Angell*, the daughter of the bankrupt's wife by a former husband, upon trust to permit the bankrupt to receive the interest of the 600*l.* for the maintenance of *M. A. Angell* during her minority, and upon her attaining twenty-one, then upon trust to pay to her the 600*l.*; and with respect to the 3000*l.*, upon trust to permit the bankrupt, during the joint lives of himself and his wife, to receive the interest of the same for his own use; and, after the death of his wife, to pay the interest to *Mary Ann Angell*; and as to the capital, for the benefit of her children. In 1806 the bankrupt and his wife, under a power contained in the deed of settlement, sold part of the freehold property of the annual value of 60*l.*, subject to the charge of 350*l.*; but some misunderstanding having arisen on the subject, the purchaser refused to pay it, whereupon

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the party entitled to the charge filed a bill in the Exchequer relating thereto, one *E. Rushworth* acting as attorney for the plaintiffs in the suit. The petition then alleged, that *Rushworth* purchased from some of the complainants their interests in the charge of 350*l.*, and procured assignments thereof to be made to him; that in 1823 the bankrupt was taken up under an attachment issued against him in the suit, and was thereon committed to the Fleet prison, where he remained till 1829; and that in March 1824, *Rushworth* procured a receiver to be appointed in the suit, and that he had in fact been in the possession of the rents and profits since that time.

The bankrupt further alleged, that in January 1825 *Rushworth* prevailed upon *R. Keddy*, the bankrupt's surviving assignee, to demand from the solicitor the proceedings under the commission, which *Rushworth* afterwards got possession of, and was appointed the solicitor under the commission. That by indentures of lease and release of the 7th and 8th January 1825, *Keddy*, as surviving assignee, conveyed to *Rushworth*, and his heirs, all the interest to which the bankrupt was entitled under the deed of settlement, and that *Rushworth* had ever since been, and still was, in the possession or receipt of the rents and profits of a certain part of the property situate at *Hull Bank*. That *Keddy*, as surviving assignee, had previously been in possession of this property, which consisted of a valuable brick field, and that during his possession he got from it upwards of a million bricks, and therewith built himself a mansion house, and had never made any allowance to the bankrupt's estate in respect thereof. That *Rushworth* had, since the conveyance of these

premises to him, used them as a brick yard, and had made and sold from them a very large quantity of bricks, for which he had not in any manner accounted to the bankrupt's estates, and that he paid no money as the consideration for this purchase; or that, if he did, the same had never been accounted for to the bankrupt's creditors.

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The petition then stated, that if the bankrupt's estate had been duly accounted for, there would be much more than sufficient to pay all the creditors 16s. 6d. in the pound, so as to make up, with the sum already paid, the full sum of 20s. in the pound, and also leave a considerable surplus for the bankrupt.

The petitioner therefore prayed, that a fiat might issue under the commission, directed to proper Commissioners; and that *Keddy* and *Rushworth* might be compelled to account before the Commissioners for all the bankrupt's estate and effects possessed, or which they might have received; and that they might also be compelled to join in all necessary sales of the bankrupt's estate for the payment to his creditors of the residue of their debts; and might be made to pay the costs of this application.

The affidavits filed by *Keddy* and *Rushworth* denied many of the statements of the petitioner,—in particular, that *Rushworth* had been appointed solicitor to the commission; and it was sworn, that although *Rushworth* did not pay a sum of money to *Keddy* for the purchase of the bankrupt's interest under the deed of settlement, yet a valuable consideration did pass from him to *Keddy* on that occasion, to the amount of 50l., for which sum *Keddy* gave him a receipt. And it further appeared, that the bankrupt had not mentioned the interest he

1833. took under the deed of settlement, when he passed his
last examination.

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Mr. *Koe* appeared in support of the petition.

Sir J. Cross.—The question is, in this case, whether the bankrupt is not now estopped from claiming any interest in this property, having sworn, in his last examination, that he had no property but what he then specified.

Mr. *Swanston*, and Mr. *Bethell*, for *Keddy*, the surviving assignee. The foundation for this petition is felony and perjury committed by the bankrupt himself. At his last examination he well knew that he had a life interest in this property, and yet did not disclose it to his creditors. The bankrupt, therefore, is entitled to no relief upon this petition; but, on the contrary, it ought to be dismissed with costs. The trust deed, although now produced, was withheld at the bankrupt's last examination; consequently he cannot be heard on this petition, however culpable the assignee may have been; but we shall show that he stands entirely free from any imputation. If a creditor, indeed, instead of the bankrupt, had presented a petition, then the Court perhaps might have granted an inquiry. [*Erskine*, C. J.—It is a clear case for inquiry, if it had not been for the conduct of the bankrupt.] [Sir *G. Rose* concurred in that opinion, and that the inquiry should be prosecuted in the name of a creditor.] [Sir *J. Cross* referred to *Ex parte Harrison* (a), which determined

(a) Buck, 246.

that the bankrupt himself could not petition for an inquiry as to the management of the estate, if he had not a pecuniary interest therein.] From what has now appeared, Mr. *Keddy* will feel bound to prosecute some inquiry; and will be very glad, if the Court will enable him to do so.

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Mr. *Bacon* appeared in behalf of *Rushworth*, and contended that he was not within the jurisdiction of that Court.

ERSKINE, C. J.—The Court will make no order yet on that point,

Mr. *Koe*, in reply, insisted that it was a fraud in *Keddy* to sign a receipt for 50*l.*, when he never actually received a farthing, as a consideration for the sale of the property to *Rushworth*.

Sir G. ROSE.—The bankrupt may go to the Bankrupt Office, and issue a new fiat in the name of a creditor.

Sir J. CROSS.—I feel a difficulty in authorizing the bankrupt to seek out a creditor to sue out the fiat, after the case of *Ex parte Lowe*, in the matter of *Aaron* (b). It seems to me, that the better plan is to call a meeting of the creditors, in order that they may have an opportunity of knowing the state of their affairs under this bankruptcy.

(b) 1 Deac. & Chit. 137.


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Holder.

ERSKINE, C. J.—The bankrupt having some interest, I think that he is the proper person to select some creditor to issue the renewed fiat.

Mr. *Swanston* then applied to the Court to impound the deed of settlement, which had been produced in support of the petitioner's case.

The COURT, however, said that they could not take the deed out of the hands of the trustees ; and finally pronounced the following order :—That the bankrupt should be at liberty, within one month, to sue out a fiat in the name or names of any one or more of the creditors who had proved their debts under the commission, to be directed to a London commissioner ; and that after the issuing of such fiat the creditors should proceed to the choice of a new assignee, or assignees, in the room of the one who was dead ; but that *Keddy* and *Rushworth* should be restrained from voting, or in any way interfering, in such choice ; with liberty to any party, or to the assignees when chosen, to apply, and reserving further directions and costs.



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Ex parte BREES.—In the matter of SMITH.

Westminster,
April 30.

IN this case a petition had been presented by a creditor, praying, that he might call a meeting of the Commissioners to enable him to prove a debt, and that the payment of a dividend might be stayed in the meantime. The fiat issued last December, and at the meeting to take the bankrupt's last examination the petitioner applied to prove for the sum of 569*l.*; but the proof was rejected by the Commissioners, on the ground that 270*l.* of this sum was objectionable. The petitioner now proposed to abandon that part of his debt, and to prove for the residue. No meeting of the Commissioners had taken place after the bankrupt's last examination until the 19th of the present month of April, when the dividend was declared; but the petitioner stated, that he did not know of this meeting, and was therefore unable to prove his debt at it. The petition had been answered for the 7th of May.

When the omission to prove a debt proceeds from a creditor's own *laches*, the Court will not order a dividend to be stayed, until his petition to prove can be heard.

Mr. *Swanston*, on behalf of the petitioner, now applied to the Court for an order that the payment of the dividend might be stayed until the petition was heard. He said, that the assignees had received notice of this application, and that it was made on the urgency of the case; as there might be no fund left to pay any dividend to the petitioner, who was willing to indemnify the estate of the bankrupt against the expenses of this order, and of any additional meeting that might be necessary to enable him to prove his debt.

The COURT, however, refused to grant any order to stay the dividend, saying, that the petitioner ought to

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—
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BRENS.

have inquired, after the rejection of his proof, when the next meeting of the Commissioners would take place; and that the other creditors ought not to be delayed in receiving their dividends, by reason of his *laches*.

Westminster,
April 30,
1834.

Ex parte DRAKE.—In the matter of DRAKE.

Before a motion is made that the petition of the bankrupt for a supersedeas shall be dismissed, on the ground of his being out of the jurisdiction of the Court, the respondent should serve the bankrupt's agent with notice of the motion, having previously obtained an order that service on the agent shall be good service.

IN this case the bankrupt, who was living abroad, had petitioned to supersede the fiat, on the ground of a deficiency in the legal requisites to sustain it.

Mr. *Whitmarsh*, on behalf of the petitioning creditor, now moved, that the Court would order the petition to be dismissed, on an affidavit that the bankrupt was out of the jurisdiction of the Court, and that he had already set at defiance an order of the Court previously made in this bankruptcy.

Sir G. ROSE.—Have you obtained any order, that service of the notice of this motion on the bankrupt's agent should be good service? For the bankrupt himself, or some one on his behalf, should certainly have notice of this application.

Mr. *Whitmarsh* having stated that no such order had been obtained,

The COURT made an order to that effect; and that the motion might be renewed after the notice was served on the bankrupt's agent.

Ex parte FAIRLIE, BONHAM & Co.—In the matter of
JOSHUA WOOD.

1833.

Westminster,
May 2.

THIS was a petition to prove two acceptances of the bankrupts, amounting to the sum of 15,789*l.* 12*s.* 6*d.*, the proof on which had been rejected by the Commissioners under the following circumstances.

On the 21st September 1825, the petitioners, through the agency of their broker, *James Wilkinson*, contracted to sell to one *John Wood*, the brother of the bankrupt, 100 bags of cochineal, for 17,528*l.*; of which sum 2000*l.* was to be paid by a bill payable at four months, and the remainder at the end of four months, and before the delivery of the cochineal. Instead of a bill, however, the 2000*l.* was paid in cash to the petitioners, they allowing the usual discount; and two bills were given for the remainder of the purchase-money, both of which were drawn by *John Wood* upon *Wilkinson*, and payable four months after date. The cochineal was not delivered to *John Wood*, but remained in the hands of the petitioners as a security for the payment of the remainder of the purchase-money, pursuant to the terms of the contract. The bills were not paid when they became due, upon which the petitioners pressed *John Wood* to provide for the payment of the residue of the purchase-money, intimating their intention, in case the same was not effected, to sell the cochineal towards the satisfaction of their claim. In consequence of this application, *John Wood*, on the 17th March 1826, sent the petitioners two bills, each dated 24th February 1826, and payable four months after date, for the sum of 7894*l.* 16*s.* 3*d.*;

Joshua W.'s commission, without deducting the proceeds arising from the sale

F. & Co. sold cochineal to *John W.*, for which a small part of the price was paid in cash, and the remainder by two bills at four months, but the cochineal was to remain in the hands of *F. & Co.* as a security for the payment of the bills. The bills not being paid when due, *John W.* sent *F. & Co.* two other bills drawn by himself on *Joshua W.*, for which no consideration was given to *Joshua W.*, the acceptor. Before these bills fell due, both *John W.*, and *Joshua W.*, became bankrupts, and the price of cochineal had fallen so much in the market, that *F. & Co.* afterwards sold it for not a third of the price at which *John W.* had bought it, and they then proved for the deficiency under *John W.*'s commission. Held, that they had also a right to prove the amount of the two bills under the sale of the cochineal.

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FAIRLIE
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which bills were drawn by *John Wood* upon and accepted by the bankrupt, *Joshua Wood*, and indorsed by *Wilkinson*. Upon receiving these two bills, the petitioners delivered up the two former ones. Before the two last bills became due, on the 6th May 1826, a commission of bankruptcy issued against *Joshua Wood*, and on the 15th June 1826 a commission was issued against *John Wood*. The two last bills therefore being both dishonoured when they fell due, the petitioners, on the 1st May 1827, applied to prove them under the commission against *Joshua Wood*, the acceptor; when the Commissioners rejected the proof, on the ground that no consideration passed from *John Wood*, the drawer, to *Joshua Wood*, the acceptor, and that previously to any proof being admitted, the petitioners ought to give up the cochineal. The petitioners then procured the cochineal to be valued by a sworn broker at the market price of the day, and attended on the 6th July 1827 to prove for the difference under *John Wood's* commission, whose assignees agreed that the petitioners might take the cochineal at the estimated value, and prove for the deficiency between that value and the amount of the balance of the purchase-money, and they were accordingly admitted to prove under *John Wood's* commission for 4655*l.* 19*s.* 0*d.* On the 23d February 1832 the petitioners sold the cochineal, which produced only 4969*l.* 0*s.* 2*d.*, and there remained then due to them, in respect of the original purchase-money, a balance of 10,820*l.* 12*s.* 4*d.*

The petitioners therefore prayed, that they might be declared entitled to prove the two acceptances under *Joshua Wood's* commission, amounting together to 15,789*l.* 12*s.* 6*d.*, without deducting therefrom the

proceeds of the cochineal; and that they might be declared entitled to receive dividends on such proof, until they should by means thereof, and of any dividends or payment which might be received by them, under *John Wood's* commission, or from *Wilkinson*, have been fully satisfied the amount of the balance due to them of 10,820*l.* 12*s.* 4*d.* Or, in case the Court should think that the petitioners were not entitled to prove for the full amount of the acceptances, then the petitioners prayed that they might be at liberty to prove for the 10,820*l.* 12*s.* 4*d.*, and that they might be paid the costs of their application out of the bankrupt's estate.

In answer to these statements of the petitioners, *Joshua Wood* made an affirmation, in which he deposed, that when his brother, *John Wood*, applied to him to accept the two bills, he represented to him that it was for the accommodation of the petitioners, and that he would not be called upon to answer them, and that he never received any consideration whatever for his acceptances.

John Wood also made an affidavit, in which he swore that *Wilkinson*, the broker, who entered into the contract for the purchase of the cochineal, wrote him word that it was agreed, that after the payment of 2000*l.* he was to be at liberty to postpone payment of the remainder of the purchase-money to such period as should be convenient for him, on condition of paying interest for the same. That on the 24th November 1825 *Wilkinson* applied to the deponent to draw the first two bills on *Wilkinson*, the latter assuring him, that the petitioners would provide him, *Wilkinson*, with the means of paying the bills; and that the deponent

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drew them, not with the intention of paying the remaining purchase-money, but as accommodation bills, and without any expectation of being called upon to make good the same. That being requested by *Wilkinson* to extend the accommodation to the petitioners, but not in payment of the remaining purchase-money, the deponent applied to his brother, *Joshua Wood*, to join him in such accommodation; and that he then drew upon his brother the two last-mentioned bills, who accepted them without any consideration passing between them.

Mr. *Swanston*, and Mr. *G. Richards*, in support of the petition. The two bills were accepted by *Joshua Wood*, as a surety for his brother *John Wood*, in order to secure to the petitioners the balance remaining unpaid of the price agreed to be paid for the cochineal. The petitioners, therefore, having received no part of that balance, have a right to prove under *Joshua Wood's* commission for the whole amount of these two bills.

Mr. *Montagu*, for the assignees of *Joshua Wood*. The question is, what was the original contract entered into by *Wilkinson*, who acted as the broker both of the petitioners and of *John Wood*. Now, it appears, that on the 21st September 1825, which was the very day on which *Wilkinson* entered into the contract with the petitioner, he wrote word to *John Wood* that the understanding was, that he was to have what further time might be wanted for the payment of the remainder of the purchase-money, by paying interest at the rate of 5*l.* per cent. This was proposed and understood by

Wilkinson, who continued the agent of the petitioners in this transaction.

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Mr. *Swanston* was not called upon to reply.

ERSKINE, C. J.—There does not appear in this case to be any agency of *Wilkinson* on the part of *Fairlie, Bonham, & Co.*, after the contract for the sale of the cochineal. But even if he is to be considered as their agent, his letters to *John Wood* amount to nothing more than holding out an expectation that *Fairlie & Co.* might be induced to extend some indulgence to *John Wood*, as to the payment of the remainder of the purchase-money. There is no ground whatever for saying, that these bills were given by the bankrupt for the accommodation of *Fairlie & Co.*; on the contrary, the fact is, that they were bills given for the accommodation of his brother *John Wood*, and were to be handed over by him to *Fairlie & Co.* in payment for the cochineal.

Sir J. CROSS.—The expression in *Wilkinson's* letter to *John Wood*, that he was to have what further time might be wanted for the payment of the remainder of the purchase-money, by paying interest at the rate of 5*l.* per cent., is satisfied by the dishonour of the two first bills, and by taking two renewed bills in their stead, payable at an extended date.

Sir G. ROSE.—The terms of the letters written to *John Wood*, both by *Fairlie & Co.* and *Wilkinson*, show very plainly that *Fairlie & Co.* were giving, not receiving, accommodation.

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FAIRLIE
and others.

Mr. *Montagu* then contended that the petitioners were not entitled to costs, as the petition was against a decision of the Commissioners.

The Court, however, thought that as the point taken in the argument was not made before the Commissioners, the costs should come out of the estate.

The Order was therefore made as prayed.



Ex parte JAMES and others.—In the matter of
JERRATT.

Westminster,
May 22.

The Court will not interfere, on the application of the assignees, to sanction an arrangement made by them for the satisfaction of a claim of the bankrupt's wife. The assignees must use their own discretion.

MR. J. RUSSELL applied to the Court for an order, referring it to the Commissioner to sanction the assignees in adopting an arrangement which they had made, with respect to the claim of the bankrupt's wife to a certain sum of money, to which she was in equity entitled. An order of this kind, he said, would at once stay all further proceedings, which the wife might be induced to take in support of her claim; and if she was compelled to file a bill in equity, the probability was, that the whole sum would be swallowed up in the expenses of the suit; whereas all parties now agreed to the present proceeding.

The COURT, however, thought that it ought not to interfere on the present occasion. For although, as a Court of Equity, it could undoubtedly entertain the question, if all the proper parties were before it, yet as

no adverse party appeared, the assignees must use their own discretion. The assignees were not brought here, but voluntarily came forward, as it appeared, for the purpose of confirming their acts by an order of this Court; which was rather a novel and expensive way of procuring a legal opinion, when they ought to be guided by the advice of their own counsel. The Court was never accustomed to interfere with assignees, in their distribution of the funds belonging to a bankrupt's estate, except there were adverse interests, or angry litigation, or the assignees had been guilty of some default.

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JAMES
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Order refused.

Ex parte BARNARD.—In the matter of SKINNER.

IN this case three policies of life insurance had been deposited with the petitioner, by way of equitable mortgage. The petitioner's debt amounted to 16,000*l.*, and the policies were only valued at 500*l.*

Southampton
Buildings,
July 2.

Under what circumstances a reserved bidding refused to assignees, on the sale of property under an equitable mortgage.

Mr. *Montagu*, for the petitioner, having obtained the usual order for a sale of these policies, and for leave to bid;

Mr. *Swanston*, for the assignees, applied to the Court that they might be allowed to fix a reserved bidding. Although the application was resisted by the petitioner, yet it was competent to the Court to exercise a discretion on the subject, and see that the property was not thrown away.

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Mr. *Montagu* contended, that the assignees were entitled to no reserved bidding in this case, unless they chose to pay the petitioner's debt; for assignees have no right to interfere with a mortgagee, except to redeem. To allow a reserved bidding by the assignees would enable them to prevent the sale of the property altogether, by fixing an unreasonable sum. In Sir *George Duckett's* bankruptcy^(a) a similar application was refused, unless the assignees undertook to pay the mortgagee his principal, interest, and costs.

The COURT said, that they could not in this instance allow any reserved bidding to the assignees; that if they wished actually to bid for this property, they might have permission to do so; but that they must abide by their bidding.

(a) See post, 297.



Ex parte THOMAS.—In the matter of THOMAS.

Westminster,
June 5.

Under the 6
Geo. 4., c. 16,
s. 96, the Court
have a general
power, upon pe-
tition, to direct
the proceedings
to be entered of
record.

THIS was a petition of the bankrupt to inrol the proceedings under a commission which had been issued against him, and afterwards superseded; his object being, to have them produced upon the trial of a party whom he had indicted for perjury, the trial for which had already been put off, to enable the bankrupt to produce the record of the commission and the proceedings under it in evidence. The commission issued on the 11th October 1831, and in November following the bankrupt petitioned the Lord Chancellor to supersede the commission. This petition was heard in

March 1832 before the Vice-Chancellor; when an order was made that the bankrupt should bring an action of trover against his assignees. The action came on for trial in May last, when a verdict was found for the bankrupt; and the commission had been superseded in consequence of such verdict.

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Mr. *Montagu* appeared in support of the petition, which he said was rendered necessary by the refusal of the solicitor to produce the proceedings at the trial.

Mr. *Monro, contra*. The question is, whether the proceedings under a commission of bankrupt can be recorded after the commission has been superseded. The first enactment upon this subject, in the 5 *Geo. 2.* c. 30., appears to have had for its object the protection of purchasers; for the 41st section of that statute, after reciting that the proceedings "are most commonly kept by such persons as clerks or secretaries to the commissioners, and by reason of the death of such clerks or secretaries are many times lost and mislaid, by means whereof *such persons as have or may purchase any messuages, lands, &c., may be disabled to make out their right and title to the same,*" then proceeds to declare that the proceedings may be entered of record. Then the subsequent statute of 6 *Geo. 4.* c. 16. s. 95., which enables the Lord Chancellor to appoint an office for registering proceedings in bankruptcy, expressly refers to the provision in the former act; and therefore the following section, the 96th, which empowers him to direct any proceedings to be entered of record, may have been intended also to refer to the enactment in the previous statute of the 5 *Geo. 2.*, and to relate only to

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the protection of purchasers. But when a commission is superseded, as is the case in the present instance, no question can possibly arise as to the protection of purchasers. In the case of *Ex parte Warren (a)*, Lord *Eldon* ordered the proceedings to be merely deposited with the secretary of bankrupts, for the purpose of being produced at an approaching trial.

The COURT, however, thought that under the 6 Geo. 4. c. 16. s. 96., they had a general power, upon petition, to direct the proceedings to be entered of record; and therefore ordered them to be deposited by the solicitor with the proper officer for that purpose; and that the costs of the appearance of the respondent on this petition should be paid by the petitioner.

(a) 1 Rose, 276.

Ex parte CLEMENT ROYDS.—In the matter of
WILLIAM ROBINSON.

Westminster,
June 5.

The Court will not interfere between two adverse claimants,—one claiming as equitable mortgagee, and the other under a prior lease made by the bankrupt of the same property,—when the estate of the bankrupt has no interest in the question.

THIS was the petition of a creditor claiming to be an equitable mortgagee of leasehold property of the bankrupt, under the following circumstances.

On the 19th September 1831, the bankrupt, being indebted to the petitioner in a large sum of money, deposited in his hands a lease, for ninety-nine years, of certain land and buildings, together with an assignment of such lease to the bankrupt,—and also another lease, granted to the bankrupt, of some other property, for

the term of seventy-eight years. On the 21st June 1832 the fiat was issued, and shortly afterwards the petitioner discovered that the bankrupt had, long previous to the deposit of these deeds, granted three sub-leases of various portions of the property comprised in the first-mentioned lease to *William Stephens, James Gibson, and Mary Greenwood*, for the remainder of the term. The petitioner alleged, that the lease to *Mary Greenwood* was granted by the bankrupt without a *bonâ fide* consideration; and was set up by her after his bankruptcy for the purpose of defrauding the petitioner.

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Ex parte
Royds.

The petitioner prayed, that the assignees might be ordered to liquidate the petitioner's debt, and secure to him the full benefit of his equitable mortgage; or if the Court entertained any doubts with respect to the validity of the sub-leases granted by the bankrupt to *Mary Greenwood*, that an issue might be directed to try the validity of such lease.

In answer to the allegations contained in the petition, it was stated in the affidavits of the assignees, and of *Mary Greenwood*, that part of the debt due from the bankrupt to the petitioner, amounting to 3600*l.*, had been secured to the petitioner by *Mary Greenwood*; and that 2000*l.* had been, since the bankruptcy, paid by her in part satisfaction of such debt. That the bankrupt had, for ten years past, acted as the agent of *Mary Greenwood*; and that she was the just and lawful holder of the land and buildings in the sub-lease mentioned, and had advanced, for the erection of the buildings, 1600*l.*; and that such lease had, ever since the making thereof, been in her possession.

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Ex parte
Rogers.

Mr. *Swanston*, and Mr. *Quin*, appeared in support of the petition, and stated that as Miss *Greenwood* had proved a debt under the fiat, she was not a stranger to the proceedings under it, and therefore could not object to the jurisdiction.

Mr. *Ching*, for the assignees, stated, that if it should appear to the Court that the petitioner was entitled to an equitable mortgage on the property in question, the assignees had no objection to the mortgage debt being liquidated in the ordinary manner; but that they objected to being made parties to the trial of any issue, which was sought by the petitioner for his own benefit, and which would not tend in the slightest degree to the benefit of the bankrupt's estate.

Mr. *Twiss*, and Mr. *Rogers*, for *Mary Greenwood*, the sub-lessee, relied on the case of *Ex parte Allison*,^(a) which appeared to be nearly parallel to the present. In that case, the bankrupt had deposited with *A.* the title-deeds of premises, which he had previously mortgaged to *R.* and Co.; and after his bankruptcy it was agreed between these two parties, and the bankrupt's assignees, that the assignees should sell the premises, and apply the proceeds in payment of *R.* & Co. and *A.* The solicitor of the bankrupt claimed a lien by deposit of the title-deeds of the premises prior to *A.*; and it was held, that there was no jurisdiction in bankruptcy to determine the priority of lien between *A.* and the petitioner, and that *A.* was not precluded from objecting to the jurisdiction, by filing affidavits as to the merits. The grounds of the Vice-Chancellor's

(a) 1 G. & J. 210.

judgment in that case were, that the question raised by the petition was one in which the estate of the bankrupt had no interest; for that it was quite immaterial to his general creditors, whether the surplus produce of the property mortgaged was applied to pay the particular debt of *A.*, or the particular debt of the petitioner.

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Ex parte
Royns.

The COURT, upon the authority of the case cited, as well as upon the facts, dismissed the petition, with costs.

**Ex parte ELLIS.—In the matter of Sir GEORGE
DUCKETT and others.**

Westminster,
June 9.

THIS was a petition of the assignees for an order to enable them to make a reserved bidding at the sale of an estate belonging to the bankrupt, Sir *George Duckett*, which had been mortgaged for 48,000*l.*, but the equity of redemption of which had been valued at 63,000*l.*

A reserved bidding allowed to assignees, on the sale of an estate, which had been mortgaged by the bankrupt.

The COURT made the Order as prayed, the assignees undertaking to pay the mortgagee his principal, interest, and costs. (*a*)

(*a*) See *Ex parte Barnard*, ante, p. 291.

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Westminster,
June 6, and
December 12.

Ex parte ROBERT MILLINGTON, and WILLIAM MILNES
MILLINGTON.—In the matter of JAMES HUDSON.

Where sums of money advanced, and to be advanced, are secured by deed, and any of the dealings then contemplated by the parties are tainted with usury, the deed is wholly void as a security, although the legal debt is not impeached.

A. employs B. as a calico printer, and before the accounts for printing become due, from time to time advances him various sums of money, charging him, besides interest, with 1*l.* 10*s.* per cent. as a trade premium, which it was customary for persons in the same trade to take under the like circumstances. A. was also in the habit of paying debts owing by B. to other persons, before they became due, when A. deducted the usual discount, but charged B. with the full

THIS was the petition of creditors, claiming to be mortgagees of an estate of the bankrupt, for a reversal of the judgment of the Commissioners, who had refused to direct a sale of the mortgaged property, on the ground that part of the debt, secured by the mortgaged deed, was tainted with usury. The facts, as stated in the petition, were as follows:—

The petitioners were general merchants at Manchester, and the bankrupt had been a calico printer at Rochdale. In the year 1826 the petitioners lent the bankrupt 1000*l.*, and in 1832 an additional sum of 3000*l.*, making in the whole 4000*l.* When the first-mentioned sum of 1000*l.* was advanced, the bankrupt delivered to the petitioners the lease of a certain farm and print works as a pledge for securing to them the repayment of the 1000*l.*, and all such other sums of money as the petitioners might afterwards advance on account of the bankrupt, or in which the bankrupt might become indebted to them on any account whatever. The petitioners employed the bankrupt to print calicoes for them, and, before his printing account became due, frequently advanced him money on the security of the lease he had deposited with them; when, besides charging him interest on such advances, they were also accustomed to charge him with a certain trade premium of 1*l.* 10*s.* per cent. on the money advanced on the printing or

amount of the debt, besides interest and the trade premium above mentioned. *Semble*, that both those modes of dealing were usurious; they were however, at least, of so suspicious a nature, that the Court declined to make an order for the sale of the property under the deed, but directed an action of ejectment to be brought by A. against the assignees.

A., having succeeded upon the trial, applied for the costs of the petition, which the Court under these circumstances declined to grant, the petition being against the judgment of the Commissioners.

business account; which the petitioners stated was the usual charge at Manchester, according to the custom of trade there, for payments made in cash in lieu of taking credit for goods or printing. Independently of these advances, the petitioners were likewise in the habit of paying the creditors of the bankrupt, by his authority, considerable sums of money; upon which payments, the petitioners admitted that they received from the creditors an abatement by way of discount, though they charged the bankrupt with the full amount of the creditor's debt, together with the premium and interest, as before mentioned. This deduction of the discount, the petitioners alleged, was for the convenience and accommodation of the bankrupt's creditors, who agreed to make such allowance, if the petitioners would advance them the money due to them,—and was also in consideration of the risk incurred by the petitioners, as to the solvency of the bankrupt. No agreement whatever was entered into between the petitioners and the bankrupt, with reference to the amount of premium or interest charged by the petitioners on the sums so advanced to him, or paid to his creditors; and all these advances and payments were kept wholly distinct from the original loan of 1000*l.*, and were carried to the printing account depending between the petitioners and the bankrupt.

It appeared that, previous to June 1831, the bankrupt had been guilty of some irregularity against the excise laws in printing a large quantity of calicoes, which the petitioners had sold to *S. Levi & Co.*, who intended them for exportation, and on which a considerable drawback was allowed; in consequence of which irregularity, the payment of the debentures for the amount of the drawback, namely, 2578*l.* 19*s.* 9*d.*,

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had been stopped by the excise. This sum was charged by *S. Levi & Co.* to the petitioners, who demanded an indemnity to that amount from the bankrupt. In order to enable the bankrupt to compromise the matter with the excise, the petitioners had agreed to lend him 1000*l.*; but while the decision of the board of excise was yet uncertain, it was agreed between the petitioners and the bankrupt, that he should execute a regular mortgage of the premises comprised in the lease, which had been deposited by him with them when they lent him the first 1000*l.*, and also a warrant of attorney,—with a view to secure the repayment of the money originally advanced by the petitioners on the security of the lease, as well as the money then contemplated to be lent for the purpose before stated, and also all such sums as were then, or thereafter should become, due from the bankrupt to the petitioners, on any account, to the extent of 3800*l.*, with interest at 5 per cent. from the respective times of the same becoming due,—and also with a view to indemnify the petitioners against all penalties and costs, which might have been incurred by them, through the instrumentality of the bankrupt, and by reason of his having sent them pieces of calico, without being properly stamped. An indenture of mortgage and a warrant of attorney were accordingly prepared, but were not then executed; as the excise had granted the bankrupt time for payment of the composition money.

The bankrupt, however, having afterwards applied to the petitioners for an advance of 930*l.* for the payment of his workmen's wages, and the petitioners having refused, unless he executed the mortgage, he on the 16th July 1831 duly executed such mortgage; when the petitioners advanced him the 930*l.*

upon the *business* account, charging him with premium and interest as usual in all these business transactions. And on the 19th July 1831, the bankrupt having also applied for the 1000*l.* to pay the excise collector, and the petitioners refusing to make such advance, unless the bankrupt executed the warrant of attorney, the petitioners advanced the 1000*l.*; which sum they, in like manner, carried to the *business* account; and the bankrupt then executed the warrant of attorney.

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and another.

On the 31st March 1832, the petitioners lent to the bankrupt a further sum of 2000*l.*, which they borrowed from their bankers for the purpose of accommodating him with, and for which they paid to their bankers 5*l.*, by way of commission. This commission they charged to the bankrupt, in addition to interest at 5*l.* per cent. On the 3d April 1832, the petitioners paid to their bankers 1000*l.* more, to be remitted to London on the bankrupt's account, for which they also paid 2*l.* 10*s.* as commission, and charged it to the bankrupt in addition to the interest. These two last sums were respectively carried by the petitioners to what they denominated the *loan* account, which included the first sum of 1000*l.* advanced in 1826, making together 4000*l.*; the repayment of which, to the extent of 3800*l.*, was secured by the indenture of mortgage and the warrant of attorney. On the sums composing this 4000*l.* no charge was made by the petitioners for premium, as they were accustomed to do in the *business* account.

On the 7th August 1832 the fiat issued against the bankrupt; and on the 19th October following the petitioners, claiming to be legal mortgagees of the property comprised in the indenture of mortgage, applied to the Commissioners to direct a sale of it, under the general

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and another.

order of 8th March 1794; when the assignees contended that the mortgage was invalid, by reason of the advances and loans having been made to the bankrupt on usurious terms; and the Commissioners came to the following result:—

1. That the original sum of 1000*l.* lent in 1826 was not liable to be impeached; and that so far, the equitable mortgage arising out of the deposit of the lease was a good security down to the execution of the mortgage.

2. That with reference to the charges of 5*l.* and 2*l.* 10*s.* made on the further loans of 2000*l.* and 1000*l.*, there was nothing usurious in those transactions.

3. That the petitioners had obtained more than 5*l.* per cent. interest on the payments made by them to the bankrupt's creditors;—and that the charge of 1*l.* 10*s.* per cent. as a trade premium for advances on the printing account, was also usurious; and that the mortgage deed was consequently void in law.

For which reasons the Commissioners refused to grant the order for sale, without the direction of a superior Court.

The petitioners insisted, that the judgment of the Commissioners was erroneous; inasmuch as they had no evidence before them, that any previous contract had been entered into for taking usurious interest; and that even if such had been proved, and such usurious interest had been taken, with reference to the business transactions, it would not invalidate the mortgage deed,—which stipulated only for the payment of lawful interest,—nor extinguish the *bonâ fide* debts, consisting of the original sum of 1000*l.*, and the two other sums of 2000*l.* and 1000*l.* lent by the petitioners

to the bankrupt, upon which the Commissioners admitted that no usurious interest was charged.

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The petitioners therefore prayed, that the judgment of the Commissioners might be reversed, so far as it related to the invalidity of the mortgage deed, and that the Court would direct a sale of the property included in that deed, in conformity with the general order;—or, if the Court entertained any doubt as to the validity of such deed, that it would direct the sale of the property under the equitable mortgage, arising out of the previous deposit of the lease with the petitioners;—or, if neither of these courses was adopted, then that the Court would direct an issue to be tried, whether any such previous contract for taking usurious interest was, in fact, entered into between the parties.

Mr. *Swanston*, and Mr. *Quin*, appeared in support of the petition. There is no dispute, as to the fact of the various advances made by the petitioners for the bankrupt, nor of the deposit of the lease, when the first sum of 1000*l.* was advanced to him by the petitioners. This, therefore, constitutes clearly a good equitable mortgage. Then, with respect to the mortgage deed of July 1831, that deed was entered into not only for securing the payment of this 1000*l.*, which was still due to the petitioners, but also all such other sums of money as then were, or might thereafter become, due and owing from the bankrupt to the petitioners. It is admitted, that if there was anything unlawful in the construction of the original debt of 1000*l.*, the deed would be void. But however it may fail in its operation as to the transactions in which a trade premium was charged, or in the payments made by the peti-

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tioners to the bankrupt's creditors, it is a legal security for the loan transactions, in which there is no imputation of usury. [Sir *J. Cross*. Suppose a man had lent another a sum of 1000*l.*, and had also won 100*l.* of him at an illegal game, and a deed was executed by him to secure the 1000*l.*, and all such other sums as were then due and owing,—would the deed be void as to the 1000*l.*, because it was void for the 100*l.*?] That is exactly the present question. The same inference is also to be adopted, in regard to the *prospective* operation of the deed, as to its retrospective effect. The real question is, what was the *intention* of the parties at the time the deed was entered into. If the object was, as it is expressed, to secure *just and true* debts afterwards to become due, the Court will not collect an intention to give a security for a prospective illegal debt, any more than it will construe it to be a security retrospectively for an illegal debt. There is no evidence whatever of the intention of the parties to secure an unlawful debt; and if so, the deed will not be void, because an unlawful debt may happen to come into existence. The case of *Le Grange v. Hamilton* (a) shows, that a bond given to secure a sum and interest due, means interest *legally due*; although there was a stipulation in that case for the payment of interest upon interest.

ERSKINE, C. J.—Here is the deposit of a lease to secure 1000*l.* for an advance; and afterwards a mortgage deed is executed by the parties, reciting that the mortgage was made to secure that sum of 1000*l.*, and

(a) 4 T. R. 613.

all other sums then due. Now it appears, that the *other sums then due* were on the *business account*; and if any of these sums then due were tainted with usury, the deed will be wholly void as a security, notwithstanding the legal debt will not be impeached: we must therefore see, from the evidence, how this *business account* was constructed.

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Mr. *Swanston*, and Mr. *Quin*, then read a number of affidavits of persons engaged in trade at Manchester, to prove, that the usual course of dealing there in the print trade was, for the printer to receive the amount of his charge by a bill at three months, or to allow 1*l.* 10*s.* per cent. premium for anticipated payment,—and that in the account current between the parties interest at 5*l.* per cent. was charged on the amount of the payment, as well as the premium.

Mr. *Montagu*, and Mr. *J. Russell*, who appeared for the assignees, stated that the bankrupt had sworn that when the petitioners were about to make payments on the printing account, he frequently asked for bills instead of cash, in order that he might save the premium for the anticipated payment, as he could get bills discounted at a lower rate than the premium he was paying; and that at several times when the premium of 1*l.* 10*s.* per cent. was deducted by the petitioners, there were not three months to run before the charge for printing would fall due.

ERSKINE, C. J.—Any occasional deviation from the general custom of dealing between the parties would not render the deed void, if the custom of dealing con-

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templated by the parties, when it was executed, was not usurious. But the petition states in plain terms, that the dealings between these parties included in the *business* account were decidedly usurious; and if these dealings were regulated or contemplated by a previous contract, it would of course affect the deed. In the affidavit also of one of the bankrupt's creditors it is sworn, that when he received payment of his debt through the medium of the petitioners, they deducted not only 1*l.* 10*s.* per cent. for the trade premium, but also 5*l.* per cent. in addition. I think, therefore, it would be difficult to hold that this was not usury.

Sir G. ROSE.—The petitioners apply here for a privilege which the Court will not be disposed to grant, if there is any doubt in their minds that the transactions between these parties are usurious: To induce us to grant the first part of the prayer of this petition, the petitioners ought to have the clearest case in the world, that there is no usury in the course of their dealings. The better way, therefore, will be for the petitioners either to take an issue, or bring an action of ejectment against the assignees.

Sir J. CROSS thought, as this Court was one of law as well as equity, it might take upon itself to decide the question, without driving the parties to a trial in another Court.

Mr. *Montagu*, for the assignees, objected also to this mode of disposing of the present question. The petition, on the face of it, states an illegal dealing, and being an appeal against the judgment of the Commissioners,

must be dismissed with costs. When the Court has any judicial doubt, which it cannot entertain in this case, it will direct an issue, but not otherwise.

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ERSKINE, C. J.—The Court must consider what is best for the interests of the estate ; for the assignees are only the ministerial officers of the Court.

The Order made was, that the property should be sold, and the proceeds paid into Court ; that an action of ejectment might be brought by the petitioners against the assignees, the assignees undertaking to go to trial at the next assizes, and the petitioners undertaking to abide the eventual decision of this Court, as to the disposal of the proceeds and the costs ; and that it should be referred to the Commissioners to fix the time and manner of sale ; the petition in the mean time to stand over, with liberty for any party to apply.

The petitioners having succeeded in the trial at law, the assignees offered to pay the principal and interest, and all the costs incurred after the order made upon the petition, but not the costs of the petition itself.

Mr. *Swanston*, and Mr. *Quin*, therefore now applied on behalf of the petitioners, that the respondents might pay the costs of the petition, and those incidental thereto. At the trial the jury gave their verdict in favour of the petitioners, without calling on the judge to

*Southampton
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December 12.*

Where a party petitions against the decision of the Commissioners, and an action is directed to be brought, the result of which is in his favour, he is not entitled to the costs of the petition, but only to the costs of the action.

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sum up the evidence. The general rule is, certainly, that costs are not given to a party, on a petition against the judgment of the Commissioners. But general rules are intended to apply only to general cases; and if the rule in any particular case becomes unjust, it ought not to be abided by,—as in the case of *Ex parte Fiske* (u), where the Lord Chancellor ordered that the costs of a petition, against the judgment of the Commissioners, should be paid out of the bankrupt's estate. The petitioners, as it now turns out, have been right throughout these proceedings; and it would be hard, that they should be saddled with the costs which had been incurred by the mistake of the Commissioners.

Mr. *Montagu contrà*, was stopped by the Court.

ERSKINE, C. J.—The petitioners ought to be well satisfied with the event of the action, without asking for the costs of the petition. The Court was against them on the former occasion; but, thinking it more satisfactory to the parties that the matter should be tried by a jury, the order they were then inclined to make was suspended. The jury have found a verdict contrary to what appeared in the affidavits on the former hearing, and also contrary to the affidavits by which the decision of the Commissioners was regulated. Although, in particular cases, where the Commissioners have not exercised a deliberate judgment, the general rule has been relaxed, yet it was never intended that the general rule should be annihilated.

Sir J. Cross.—I do not see anything to take this case out of the general rule. If there is anything peculiar in it, it is rather against the petitioners; for they ought to have made as good a case before the Commissioners in the first instance, as they did before the jury.

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Sir G. Rose concurred.

The application was therefore dismissed with costs. (a)

(a) Where an issue is directed by the Court, and the result of the trial is against the decision of the Commissioners, the costs of the issue are allowed, but not the costs of the petition; *Ex parte Edwards*, Buck. 232. And see 1 Deac. B. L. 852, 854. See also *Ex parte Waterhouse*, ante, 108, and note 110.

Ex parte SMITH.—In the matter of STANGMAN.

Westminster;
June 6.

THIS was the application of a creditor of the bankrupt, that the fiat already issued might be annulled, and a new fiat issued, under the following circumstances. The petitioning creditor had, since the issuing of the fiat, become a bankrupt himself, the fiat not having been opened; and though an official assignee had been appointed, he refused to go on with the fiat. The fiat, therefore, still remained unopened; and while it was in existence, no creditor could issue a fresh one, without the sanction of the Court.

A petitioning creditor having become bankrupt before the fourteen days for opening the fiat had elapsed; it was ordered that another creditor might take new docket papers into the office, and if the first fiat was not prosecuted, that he might then issue a fresh fiat.

Mr. Montagu appeared in support of the petition.

Mr. Ayrton, for the official assignee, submitted to any order which the Court thought fit to make.

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The COURT said, that as the fourteen days for opening the fiat had not yet elapsed, there were, of course, no assignees yet chosen under the fiat. But as the assignees, when chosen, ought to have the option to proceed with the fiat or not, it was very doubtful whether the Court had authority to make the order prayed in this case. They added, that the only order they could make was this:—Let the petitioner be at liberty to take new docket-papers into the office, and if the present fiat against the bankrupt is not prosecuted, then let the petitioner be at liberty to issue a fresh fiat.

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June 20.

Ex parte HENRY RUSSELL DOUGLAS.—In the matter
of WILLIAM NOBLE.

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account. The intestate died in 1801, and a commission issued against the bankers in 1810; notwithstanding which, the same partner continued to receive the dividends, and pay them to the in-

testate's widow, up to the period of his own death, which happened in 1822; some time after which the assignees of the bankers claimed a lien on the debenture, for a debt due from the intestate to the banking-house: *Held*, that after so long an abandonment of any claim of lien, the assignees could not now support such claim; and that the debenture, also, could not be considered as having been left in the order and disposition of the bankers, having been deposited in the nature of a trust.

THE petitioner, in this case, was the natural son of one *Peter Douglas*, deceased; who, in order to make a provision for him, in the year 1790, when the petitioner was only twelve months old, purchased a 100*l.* share in a government tontine annuity, with benefit of survivorship on the life of the petitioner, but in the name of the bankrupt, who was a partner in the banking-house of *De-vaynes, Noble, & Co.*, who were the bankers of *Peter Douglas*. During the life of *P. Douglas*, the bankrupt always received the dividends payable on this tontine share, and carried them to the credit of the account of *P. Douglas*, at whose sole expense the petitioner was

maintained. *P. Douglas* died intestate in the year 1801, from which time the bankrupt also continued to receive the dividends on the debenture, and paid them to *Ann Douglas*, the widow and administratrix of *P. Douglas*, who had taken upon herself the support of the petitioner. In 1810 a commission of bankrupt issued against *William Noble*, but he still continued to receive the dividends, and paid them to *P. Douglas's* widow, who afterwards married *John Champion*. The bankrupt died in 1822, when the tontine debenture was given up to *Ann Champion* by the bankrupt's executors; but the assignees had refused to make a legal assignment of it, either to *Ann Champion*, in trust for the petitioner, or to the petitioner himself; the assignees claiming a lien upon the debenture for the debt due from *P. Douglas* to the banking-house of *De-vaynes, Noble, & Co.* For want of this assignment, the payment of the dividends could not be obtained by the petitioner.

The petitioner therefore prayed, that the assignees might be directed to assign the tontine debenture to the petitioner, and that the costs of the petition might be paid out of the bankrupt's estate.

In support of the petitioner's claim, the widow of *P. Douglas*, now *Ann Champion*, made an affidavit corroborating the above facts; and further stating, that *P. Douglas* died insolvent, and that she after his death expended, for the maintenance of the petitioner, more than the dividends on the tontine share purchased on his life.

Mr. for the petitioner. This debenture, being bought with the money of *P. Douglas*, the pur-

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chase operates as a resulting trust for the petitioner; and the bankrupt always admitted, in his lifetime, that the purchase was intended by *P. Douglas* for the benefit of the petitioner.

Sir G. ROSE.—There is no doubt that there is a resulting trust, but for whom? The difficulty is, as to the evidence before us of the person for whom this trust was intended to operate. There being no satisfactory evidence of that fact, the purchase of the debenture must result for the benefit of *P. Douglas's* general estate, unless the petitioner can offer better proof that he himself was the specified object of such purchase. The debenture is treated all along as part of the general personal estate of *P. Douglas*. That question, however, can only be raised between the administratrix, the petitioner, and the assignees; and the administratrix is not now regularly before the Court. The first question is, whether or not, at this point of time, the assignees can set up any claim against the administratrix.

Sir J. CROSS.—It appears that *Noble*, ever since his bankruptcy in 1810, paid the annuity to the widow of *Peter Douglas*, without the assignees making any claim to it. This is rather strong evidence against their title.

ERSKINE, C. J.—How can the assignees account for having permitted the bankrupt to pay the annuity for so long a period of time to *Ann Champion*, consistently with the lien they now claim on the debenture?

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Mr. G. Richards, for the assignees, contended that there was no evidence of the petitioner being entitled to the debenture, the annuity having always been paid to the personal representative of *Peter Douglas*. The petitioner never made any application for the debenture, on the death of *Noble* in 1822; but the only person claiming it was the administratrix of *Peter Douglas*. [Sir J. Cross. That is a strong circumstance against your claim; for *Noble* goes on paying the annuity, instead of claiming any lien, or making any deduction on account of the debt due from *Peter Douglas* to the banking-house. This shows, that he acted under a consciousness that it was trust property.] The petitioner, however, ought to have made it appear to the Court, that this debenture was not administered to as part of the personal estate of *Peter Douglas*. How came the petitioner, if he was beneficially entitled to this property, not to claim it when he attained 21? Instead of that, he lets the administratrix deal with it as part of the personal estate of *Peter Douglas*. The claim of the assignees also rests on another foundation. They contend, that this debenture was left in the order and disposition of *Noble* at the time of his bankruptcy, and passed to the assignees under the provisions of the bankrupt law. For whether the petitioner, or the administratrix, was entitled to it, the party claiming any property in it should have given notice to the Treasury, who pay the money to the lawful holder of it. That is also the practice in the Accountant-General's office, when a legacy is assigned, and is required likewise in various other instances of a similar nature. [Sir J. Cross. How does this case differ from that of a trustee of money in the funds becoming bankrupt? The money

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there is not considered as in the order and disposition of the bankrupt.] The Treasury would have gone on up to the present time, paying the money to *Noble*, if he had lived, unless they had had notice of the claim of some other person.

Sir J. Cross said, it was a matter worthy of observation, that the petitioner was described in the debenture as “the son of *Peter* and *Frances Douglas*.”

ERSKINE, C. J.—It is quite idle to contend, at this period of time, that the assignees of *Devaynes, Noble & Co.* have any lien on this debenture, after suffering the money to be received and dealt with by *Noble* from the time of his bankruptcy in 1810, up to the time of his death in 1822, and even then making no claim to have the debenture delivered up to them by *Noble*’s executors. And as to the claim which is now set up by the assignees, on the ground of the debenture having been left in the order and disposition of *Noble* at the time of his bankruptcy, there is nothing in that point, as it was a case of trust. I think the debenture must be considered as part of the personal estate of *Peter Douglas*, and that the assignees ought to assign it to his administratrix.

Sir G. Rose.—The assignees have not made out the slightest case of lien on this debenture. As against the administratrix, they can make nothing of the point of order and disposition. The debenture should be assigned to her; and the Order may be drawn up, upon reading the affidavit of the administratrix, as if she had appeared on this petition.

The Order made was, that the assignees of the bankrupt should execute an assignment of the debenture to the administratrix of *Peter Noble* deceased, or to such person as she should direct, if she disclaimed all interest in it; and that each party to this petition should pay his own costs.

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In the matter of ROBERTS.

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June 21.

MR. *TWISS* applied, on behalf of the petitioning creditor, to amend a fiat which had not been opened, by altering the date of it from the 28th May to any day after the 10th June. The object of the alteration was, that the petitioning creditor meant to rely on the bankrupt's lying in prison as the act of bankruptcy; and as he had not been in prison the requisite time before the fiat issued, the Commissioners could not with safety proceed to adjudication, unless the date of the fiat was altered to some day after the bankrupt had lain in prison the whole 21 days. Under the old law (*a*) there would have been no need for this application,

Quere, Whether the date of a fiat, which has not been opened, can be altered, so as to give effect to a subsequent act of bankruptcy.

(*a*) This is not quite correctly stated by the learned counsel. Under the old law, indeed, the doctrine of *relation*, as regarded this act of bankruptcy, was different; because the 21 *Jac.* 1. c. 19. s. 2. expressly declared, that the party should be accounted a bankrupt "from the time of his first arrest." But no *commission* could be issued upon an act of bankruptcy of this description, until the whole time specified in the statute for the lying in prison had expired; for no subsequent lying in prison would give effect to a previous commission; *Gordon v. Wilkinson*, 8 T. R. 507. And see 1 Deac. B. L. 79.

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but the case is different under the new statute of 6 Geo. 4. c. 16.

ERSKINE, C. J. thought this Court ought not to interfere; as, by the provisions of the 1 & 2 Wm. 4. c. 56., the fiat was issued under the immediate authority of the Lord Chancellor(*a*), and in this case there was nothing to amend by.

Sir J. CROSS was of opinion, that as the fiat had not been opened, the Court might say it ought to be amended, if the Lord Chancellor thought fit.

Sir G. ROSE said, that it was always the practice in bankruptcy to amend a mere clerical error in a commission, if it had not been opened; and he thought this case came within the same principle, and that the Court might recommend the alteration to be made, if the Lord Chancellor should think fit; leaving his Lordship at liberty to act in accordance, or not, with the opinion of this Court.

The Order was therefore made as prayed, subject to the approbation of the Lord Chancellor(*b*).

(*a*) And see *Re Walker*, 1 Deac. & Ch. 381. But see contra *Re Graham*, id. 458; *Re Bell*, post, 326.

(*b*) But see *Ex parte Chesewright*, 1 Rose, 228, 18 Ves. 480; which seems to be an authority against the amendment of the fiat in the present case.



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July 1.

In the matter of DAWSON.

IN this case, the bankrupt had obtained the signature of Mr. Commissioner *Fonblanque* to his certificate, but the Deputy Registrar refused to deliver it to him, unless he paid 3*l.*, being the amount of the former fees paid to the Commissioners when they met to sign a bankrupt's certificate. This fee the bankrupt was obliged to pay, under a protest however that the assignees, and not himself, were answerable for it, under the provisions of the Bankruptcy Court Act.

Under the Bankruptcy Court Act, the bankrupt is not bound to pay the fee for the signature of the Commissioner to his certificate, but the assignees, *come semhle*, are now liable for the payment of it.

Mr. *Bethell*, on behalf of the bankrupt, now applied for an order that this fee might be returned to him. The question was, whether the Commissioner was entitled to exact this fee from a bankrupt, when he signed his certificate, after the alteration made in the administration of the bankrupt law by the 1 & 2 *Wm.* 4. c. 56. The 47th section of that act directs, that in all commissions of bankrupt removed (as was the case in this instance) into the Court of Bankruptcy, and under which the choice of assignees shall have taken place prior to the operation of the act, there shall be paid *by the assignees*, in lieu of all other sums directed to be paid under the act, the sum of 3*l.*, on every sitting under such bankruptcy which shall be held in the said Court, &c. And the previous act of the 6 *Geo.* 4. c. 16. s. 22. specified what fees were to be paid to the Commissioners, namely, 20*s.* to each Commissioner for every meeting, and the like sum for the signature of the bankrupt's certificate; but said

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nothing about a meeting or sitting of the Commissioners, for the purpose of signing the certificate. This sum of 3*l.*, therefore, the bankrupt contends, should be paid by the assignees. [*Erskine*, C. J. Have you looked at the 55th section of the Bankruptcy Court Act, which directs, that there shall be paid to the Accountant-General, by the official assignee, for any sitting at which the bankrupt's certificate shall be signed by the Commissioners, the sum of 1*l.*?] It was not a *sitting*, at which the Commissioners under the former practice were accustomed to sign the bankrupts' certificates (a); but the fee was payable to each of them, when the certificate was taken to them separately for their signatures. The preamble of the 1 & 2 *Wm.* 4. c. 56. declares the intention of the act to be "that the rights, as well of the bankrupts themselves, as of their creditors, may be enforced with little expense, delay, and uncertainty as possible." The Court will therefore construe the act according to its spirit, if they hold that this sum of 3*l.* is payable by no person for the bankrupt's certificate. But if they think that it ought to be paid by somebody, then it is plain that the bankrupt is not individually chargeable with it, but that it ought to come out of his estate, as the 47th section expressly directs that the fee shall be paid *by the assignees*; and several of the Commissioners have already in other instances decided to this effect. The sum can be claimed only *modo et formâ*, according to the provisions of the act.

ERSKINE, C. J.—Before the passing of the 1 & 2

(a) See 2 Deac. B. L. 273, note (2).

Wm. 4. c. 56., the sum of 3*l.* was payable to the Commissioners for the signature of the bankrupt's certificate, under the provisions of the 6 *Geo.* 4. c. 16. s. 22. And by the 55th section of the Bankruptcy Court Act, it would seem, that that statute contemplates every act to be done by the Commissioner, as *at a sitting* under the former statute. I think, therefore, that the sum of 3*l.* was payable for the signature of the Commissioner to the certificate, but that it ought to be paid by the assignees.

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Sir J. CROSS.—I perfectly agree with his Honor the Chief Judge, that the bankrupt is not liable to pay the 3*l.*, and that it must be returned to him by the Deputy Registrar. But I shall reserve my opinion, as to *who* is to pay this money, until that question comes directly before the Court.

Sir G. ROSE concurred with the Chief Judge, and thought that an order should be made on the official assignee to pay the 3*l.* to the bankrupt; which was

Ordered accordingly.



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J. apprenticed his son to the bankrupt two years before his bankruptcy, and agreed to pay a premium of 200*l.* *J.* was in partnership with *T.*, and the bankrupt owed them a joint debt exceeding the amount of the apprentice fee due from *J.* to the bankrupt. *J.* cannot set off the apprentice fee against the joint debt due from the bankrupt to *J.* & *T.*

The Court, under these circumstances, ordered 100*l.* to be paid by *J.* to the assignees, together with the costs of the petition.

Ex parte JAMES SOAMES and others.—In the matter of JAMES PESTELL.

THIS was a petition of certain creditors of the bankrupt, that another creditor, who was also sole assignee of the bankrupt's estate, might be ordered to account for an apprentice fee, which he had contracted to pay to the bankrupt with his son.

It appeared, from the statement in the petition, that about two years previous to the issuing of the fiat, *Joseph Gripper*, the assignee, apprenticed his son to the bankrupt for the term of five years, and agreed to pay 200*l.* as a premium, but never in fact paid any part of this sum to the bankrupt previous to his bankruptcy. *Gripper* proved a debt under the fiat, on the joint account of himself and his partner, for the sum of 240*l.*, as the balance of an account alleged to be due from the bankrupt, after deducting the 200*l.* so due from *Gripper* for the premium. He then applied to the Commissioner for a return of the proportion of the apprentice fee, alleged to have been paid by him to the bankrupt with his son, concealing from the Commissioner the truth, that the fee had never been paid by him to the bankrupt, otherwise than by setting it off against the joint debt due from the bankrupt to *Gripper* and his partner; when the Commissioner, being ignorant of this fact, ordered the sum of 100*l.* to be returned to him in part of the apprentice fee out of the bankrupt's estate, before any dividend should be declared. Being subsequently informed, however, of the true state of the case, the Commissioner examined the bankrupt on

the subject, and rescinded his former order, after passing a strong censure on the conduct of *Gripper*.

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The debts proved under the fiat exceeded 3000*l.*, and the amount of the proceeds of the bankrupt's estate, which were then available for a dividend, was only the sum of 100*l.* in the hands of the official assignee; so that if *Gripper* had succeeded in his scheme of getting this 100*l.* as a return of part of the premium, he would have swept away the whole of the bankrupt's property. The petitioners contended that the amount of the apprentice fee, being a debt due to the bankrupt from *Joseph Gripper* on his separate account, could not be set off against the debt due from the bankrupt to *Joseph Gripper* and his partner on their joint account.

The petitioners therefore prayed, that *Joseph Gripper* might be ordered to pay to the official assignee the sum of 200*l.*, on account of such apprentice fee, after allowing to him such part thereof as the Court, or the Commissioner, might, under the circumstances of the case, think that he was entitled to retain.

Mr. Ching, who was counsel for the petition, not appearing to support the petition when it was called on,

Mr. Stinton, for the respondent, applied that the petition might stand the first in the paper for to-morrow.

Sir G. Rose.—You may either have it struck out of the paper, on the ground of the petitioner not appearing, or have it set down for the next day of petitions; but we cannot pursue any other course.

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Ex parte
SOAMES
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Mr. *Ching*, however, shortly afterwards appearing in Court, the petition was permitted to be heard. He referred, in support of the prayer of the petition, to the 49th section of the 6 Geo. 4. c. 16., which directs, “that where any person shall be an apprentice to a bankrupt at the time of the issuing of the commission against him, and any sum shall have been really and *bonâ fide* paid by or on the behalf of such apprentice to the bankrupt, as an apprentice fee, it shall be lawful for the Commissioners, upon proof thereof, to order any sum to be paid to or for the use of such apprentice, which they shall think reasonable, regard being had, in estimating such sum, to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previous to the issuing of the commission.” This clause only relates to an allowance to the apprentice, where the premium has been actually paid to the bankrupt; but where no part of the fee has been paid, its provisions would seem to apply to ordering a reasonable portion of the premium to be made good to the bankrupt’s estate. The fiat in this case was issued by *Thomas* and *Joseph Gripper*, on a joint debt due from the bankrupt to them as co-partners; *Joseph Gripper* had therefore no right to set off this partnership debt against the separate debt he owed the bankrupt for the apprentice fee with his son. There was, in fact, a book passing between the bankrupt and *Thomas* and *Joseph Gripper* every week previous to the bankruptcy, and no credit was ever given to the bankrupt for this apprentice fee in that book. [*Erskine*, C. J. The question is, whether there

was ever an arrangement between the parties previous to the bankruptcy, which amounted to payment of the premium.] On the contrary, it is stated in the petition, and cannot be contradicted, that there never was any agreement between the parties that the amount of the premium was to be paid out of the debt due from the bankrupt to *T. and J. Gripper*, who, after the premium had become due, made out and delivered their joint account to the bankrupt, in which they made no deduction of the amount of the premium.

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Mr. Stinton, contra. There was a receipt for the amount of the premium indorsed on the indenture of apprenticeship, which was signed by the bankrupt, though no money actually passed at the time; for it was understood between the bankrupt and *J. Gripper*, that as the bankrupt was indebted to *T. and J. Gripper* in a larger sum, that the 200*l.* was to be set off against the debt owing to *T. and J. Gripper*. *J. Gripper* has stated on affidavit, that on a former occasion the son of *T. Gripper* had been so apprenticed to the bankrupt, and that the premium had been so agreed to be set off; and that it was fully understood in the present instance that the 200*l.* was not to be paid to the bankrupt, but to be set off in the same way as on the occasion of the former apprenticeship. [Sir *G. Rose*. Your point is, whether this understanding was actually carried into effect before the bankruptcy.] It is admitted, that the 200*l.* was not actually carried into the account between the parties, but it is sworn that it was understood that it was to be so.

Mr. Ching, in reply, was stopped by the Court.

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SOAMES
and others,

ERSKINE, C. J.—It was incumbent on the respondent in this case, if there was no actual payment by him of the 200*l.*, to show something tantamount to payment. It is stated to have been sworn by the respondent, that it was understood that the amount of the premium was to be set off against the debt due from the bankrupt to *T. and J. Gripper*; but one man cannot swear what another understood; and even if he could, an *understanding* does not amount to an *agreement*. The respondent was bound to give some evidence of an express agreement between himself and his partner with the bankrupt, that the 200*l.* was to be carried into the account pending between them, and to be deducted from the amount of the debt owing by the bankrupt to *T. and J. Gripper*. Now all that is sworn is, that it was *understood* the premium was to be so deducted, because on a former occasion the son of another brother of the respondent was apprenticed to the bankrupt upon these terms. If it had been sworn that, at the time of this apprenticeship, it was expressly agreed between *T. and J. Gripper* and the bankrupt, that the 200*l.* was to be deducted from the joint debt due from him to them, the respondent would then indeed have a case in answer to this petition; but as the case now stands before the Court, there is no pretence for the right now claimed by him to set off the amount of the premium owing by himself to the bankrupt, against the joint debt due from the bankrupt to the respondent and his partner.

Sir J. CROSS.—The question is, whether *J. Gripper* has a right to liquidate the 200*l.* owing by him to the bankrupt, by deducting it from the joint debt of the bank-

rupt owing to *J. Gripper* and his partner *T. Gripper*; whether, in short, he has a right thus to obtain 20s. in the pound upon a large portion of his debt, while the rest of the bankrupt's creditors must necessarily receive a very small, if any, dividend. Who were the parties to the contract of apprenticeship? The bankrupt and *J. Gripper* alone. *T. Gripper* had nothing whatever to do with this contract. And though *J. Gripper* has sworn, that it was *understood* that the amount of the apprentice fee was to be paid by being set off against the joint debt owing from the bankrupt to *T. and J. Gripper*, yet it appears the only ground for this understanding was, because that mode of payment was resorted to on a former occasion, when *T. Gripper* put out his own son as an apprentice to the bankrupt. I am of opinion, therefore, that *J. Gripper* ought to pay the amount of the premium to the official assignee, subject to such deduction or allowance as is consistent with the provisions of the act of parliament.

1833.

Ex parte
SOAMES
and others.

Sir G. ROSE. — As the respondent has not been able to show, that there was any entry of this sum of 200*l.* to the credit of the bankrupt in the account current between him and *T. and J. Gripper*, I think it is clear that it cannot be set off against the joint debt. Supposing that the two partners had brought an action against the bankrupt for recovery of the partnership debt, what evidence would the bankrupt have had to prevent them from recovering the full amount of their debt? He could not claim to set off the separate debt of 200*l.*, which was owing to him by *J. Gripper*. If the bankrupt, therefore, had no such right, so neither has *J. Gripper*.

1893.

Ex parte
SOAMES
and others.

The Order made was, that *J. Gripper* should pay to the official assignee the sum of 100*l.*, with the costs of this petition, and that *T. and J. Gripper* should be at liberty to increase their proof as they should be advised.

Southampton
Buildings,
July 1.

In the matter of BELL.

Quære, Whether the Court can direct the amendment of a fiat, without the approbation of the Lord Chancellor; and whether this can be done now, after adjudication.

Semble, that the name of one of the Commissioners, who has not acted under the fiat, being mis-spelt, is not such an error as to require amendment.

MR. CHING applied to amend a fiat, by altering the name of one of the Commissioners, which had been mis-spelt. His reason for applying to this Court, he said, was, because they thought at the Bankrupt Office that the Lord Chancellor, though having the sole jurisdiction to issue a fiat, had nevertheless no power to amend one. (*a*)

(*a*) The opinion of the officer in this instance appears to be perfectly correct, notwithstanding the recent decision in *Ex parte Keys*, *ante*, 263. It is true that, by the 12th section of the Bankruptcy Court Act, the power is reserved to the Lord Chancellor to issue a fiat, in lieu of the former commission; and by sect. 19 also, he has still the sole power to rescind or annul it. But by sect. 13, the fiat, when issued, is directed to be filed and entered of record in the Court of Bankruptcy, and is declared thenceforth to be a "*record of the said Court*." Then, as the 1st section of the act invests the Court with "all the rights, incidents and privileges of a Court of Record,"—and as the 2d section declares, that the Court shall have "superintendence and controul in all matters of bankruptcy, and also power, jurisdiction, and authority to hear and determine, order and allow all such matters in bankruptcy, as now usually are, or lawfully may be, brought by petition or otherwise before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy, or elsewhere,"—it would seem to follow, that the Court of Review has, at least, the power incident to all other Courts, of amending its own *records*, whether the Lord Chancellor has power to amend the fiat or not. The intent of the act appears to be, to transfer all the former jurisdiction in bankruptcy to the Court of Review, (except the mere *issuing* or *annulling* of the fiat,) subject to an *appeal* only to the Lord Chancellor; though it is, to be sure, a most extraordinary anomaly, after the powers given to the Court by the 1st and 2d sections, that the 11th section should

The fiat in this case had been opened, and the party declared a bankrupt; but he had been prevented from passing his last examination, by the absence of one of the quorum commissioners from the meeting held for that purpose, and the time for passing the examination had now expired. The Commissioner, whose name was mis-spelt, had not hitherto acted under the fiat.

1838.

 In re
BELL.

ERSKINE, C. J. thought that the Court could not direct the amendment of a fiat after adjudication (*a*); and that as the Commissioner, whose name was sought to be amended, had not as yet acted under the fiat, the defect was not material (*b*).

Sir G. ROSE said, that the best mode of proceeding, under these circumstances, would be for the other

prevent it from making any rule or order to regulate its own practice, its own sittings, or the conduct of its own officers, except with the consent of the Lord Chancellor. The power of the Court, however, to amend a fiat, without the approbation of the Lord Chancellor, seems to be still *veraxata questio*. Vide *Re Roberts*, ante, 315; *Re Walker*, 1 Deac. & Ch. 381; and *Re Graham*, Id. 458.

(*a*) According to the former practice in bankruptcy, when a commission had once been *opened*, it could not be amended, even to correct a mere clerical error, and the only remedy was to supersede it, and issue another. See 1 Deac. B. L. 119, and the cases there cited. The principle, however, on which this rule appears to have been founded was, that any alteration of the commission would have been a fraud upon the Stamp Laws; but as the commission and the other proceedings are now exempted from any stamp duty, this principle no longer applies.

(*b*) This view of the case is consistent with that taken by Lord Eldon, on an application made to him under similar circumstances, except that in that case the Commissioner, whose name was mis-spelt, was one of those who had signed the adjudication of bankruptcy. For on an application to amend the commission, by altering the spelling of his name, it does not appear that his Lordship made any order to amend the commission, but merely ordered the other Commissioners to proceed to a new adjudication. *Re Barber*, 2 G. & J. 81.

1833.

In re
BELL.

Commissioners to appoint a time and place for the bankrupt to surrender, and then to state the reason why he had not surrendered before; whereupon it was so

Ordered accordingly.

Southampton
Buildings,
July 2.

Ex parte EDMUND BATTEN and JOHN BATTEN.—In
the matter of WILLIAM WILLMINGTON.

A. is in the habit of sending skins to B.'s tan-yard to be dressed, with an account, as of a sale, of each parcel of skins to B.; and B. renders an account of the dressed leather, as being sold by him to A. This mode of dealing was only practised by B. with A., nor was B. in the habit of dressing skins for any other persons. *Held*, that a quantity of these skins, which were mixed with B.'s general stock at the time of his bankruptcy, passed to his assignees, on the principle of reputed ownership.

THE bankrupt in this case carried on the business of a glove-manufacturer at Milborne, in Somersetshire, and his father carried on the same trade at Yeovil, in the same county; but it was stated in the petition, that no partnership ever subsisted between them. The father and son, however, being jointly indebted to the petitioners in a large sum of money, entered into a bond and warrant of attorney to secure it, on which the petitioners on the 13th April 1832 entered up judgment. On the 5th May 1832 a fiat was issued against the son; and on the 9th May 1832 the petitioners sued out an execution on this judgment, under which they took possession of two packs of skins, as the property of the bankrupt's father, then being in the tan-yard of the son, and which were now claimed by the bankrupt's assignees. It appeared that *William Willmington*, the father, having let his own tan-pits for tawing or dressing leather at Yeovil, had, for two or three years before his son's bankruptcy, been accustomed to have his skins dressed at the yard of his son at *Milbourne*. On the 4th April 1832 *William Willmington*, the father, purchased three packs of Tuscan lamb skins for 175*l.*, which were, by his direction, sent

to the bankrupt's yard at Milbourne Port to be tawed or dressed into leather. Two of these packs of skins were those seized by the officer under the execution, when the messenger was in possession of the bankrupt's property. The skins were put into the pits of the bankrupt, and they necessarily remained there for some time for the purpose of being dressed, which operation was not completed before the 21st July 1832; when the officer, who had continued in possession of them from the time of the seizure, was about removing them, but was prevented by the messenger under the bankruptcy. The skins had been afterwards manufactured into gloves, and sold with the other effects of the bankrupt, and the proceeds paid to the official assignee. It appeared, that the mode of dealing between the father and son was as follows:—When the father sent skins to be dressed, there was an account of a sale made out from the father to the son, and afterwards an account of the dressed leather as being sold to the father. This mode of dealing was only practised by the bankrupt with his father, nor was he in the habit of tawing or dressing skins for any other persons. There is a difference between the operations of *tawing* and *tanning* leather; *tawing* is dressing it merely with lime, but *tanning* is dressing it with bark.

The petitioners prayed, under these circumstances, that the produce of these two packs of skins might be paid to them by the official assignee.

Mr. *Whitmarsh* appeared in support of the petition, and contended that the assignees had wrongfully possessed themselves of these skins, which were as much the property of *Willmington*, the father, as cloth sent

1833.

Ex parte
BATTEN
and another.

1833.

—
Ex parte
BATTEN
and another.

to a tailor to be made into a coat is the property of the customer.

Mr. *Montagu*, for the assignees, said, that there were two conclusive answers to this petition: 1st, The bankrupt was the real owner of these skins; and 2dly, If he was not the real owner, he was at any rate the reputed owner.

ERSKINE, C. J.—If the bankrupt had been in the habit of being employed to dress skins for other persons, in the same way as it is alleged he was employed by his father, that circumstance would have made a great difference in the complexion of this case; because the skins could not then have been considered to be so much in the order and disposition of the bankrupt. But it appears to me, that it is impossible not to look upon these skins, as being left in the possession of the bankrupt at the time of his bankruptcy with the consent of the true owner, and that the messenger had a right to prevent them from being seized by an execution creditor, as the property of the father. What greater inference can there be of reputed ownership than this? The alleged dealing between the father and son was not a course of dealing known to the world,—there was an account of sales rendered with these skins from the father to the son—and the skins were mixed with the bankrupt's general stock, when they were taken possession of by the messenger.

Sir J. CROSS.—If there had been any evidence before the Court of the nature of the trade, or any proof that it was the custom for tanners to tan or dress lea-

ther for one another upon the same terms as were practised by these parties, then there might have been some grounds for the claim of these petitioners, in opposition to that set up by the assignees on the principle of reputed ownership. But that principle applies to this case to its full extent, and is a complete answer to the present petition.

1833.

Ex parte
BATTEN
and another.

Sir G. ROSE.—The *prima facie* semblance of ownership might have been displaced by evidence adduced on the part of the petitioners ; such as proving it to be the custom of the trade for one glove manufacturer to taw skins for another, or that the bankrupt was employed in the same way by other persons. But nothing of this sort appears to take the present case out of that class of cases, where property left in the possession of the bankrupt, with the consent of the true owner, is held to pass to his assignees.

Petition dismissed with costs.

Ex parte LACKINGTON.—In the matter of THROCKMORTON.

Southampton
Buildings,
July 2.

THIS was the petition of an official assignee, praying that certain unclaimed dividends might be divided amongst a particular class of creditors, who had proved their debts some time after the first dividend was declared under the commission, and who had not, for this reason, received so much in proportion towards the payment of their debts, as the other creditors.

Unclaimed dividends can only be ordered to be divided among all the other creditors, generally, and not among a particular class of creditors.

1838.

Ex parte
LACKINGTON.

Mr. *Lewis* appeared in support of the petition.

The COURT refused the application, saying, that the 110th section of the 6 *Geo.* 4. c. 16. only authorized the division of the unclaimed dividends, generally, "amongst the other creditors," and not among any particular creditors, to the exclusion of the others; and the Court added, that it was the less inclined to make any order of this nature, on the application of the *official assignee*.

Southampton
Buildings,
July 2.

The guard of a stage-coach hired at weekly wages is not a servant, within the meaning of the 6 *Geo.* 4. c. 16. s. 48.

Ex parte SKINNER.—In the matter of COOPER.

THE petitioner in this case was the guard of a stage-coach, who had been hired by the bankrupt, a stage-coach proprietor, at the wages of 2*l.* per week. He applied to the Commissioners, under the 6 *Geo.* 4. c. 16. s. 48., for an allowance of six months' wages due to him from the bankrupt, but his claim was rejected; and this was an appeal from their decision.

Mr. *Chandless*, in support of the petition, contended that the petitioner was, to all intents and purposes, a servant of the bankrupt, within the meaning of the Bankrupt Act, as much as he would be within the meaning of the 11 *Geo.* 4. and 1 *Wm.* 4. c. 68., a statute passed for the protection of coach proprietors; the 8th section of which last-mentioned statute declares that nothing in the act shall be deemed to protect the proprietor from liability for the felonious acts of "any coachman, guard, book-keeper, porter, or other servant in his employ;" thereby clearly showing, that the legislature by that

statute looked upon a *guard*, as the *servant* of the stage-coach proprietor. In *Ex parte Grelhier* (a) the Vice-Chancellor decided, that the workmen of a coach-maker, who worked by the piece, and received a specified sum for each particular job, under separate and distinct contracts, and where there was no hiring for a specific time, were *servants*, within the meaning of the 48th section of the Bankrupt Act. It is true, that this decision was afterwards reversed, on appeal, by the present Lord Chancellor (b). But the allowance is not to be confined to mere domestic servants, or clerks; as appears from the case of *Ex parte Neal* (c).

1823.

Ex parte
SUNNEN.

ERSKINE, C. J.—The statute, I think, seems to have contemplated a servant for some duration of time, by authorizing the Commissioners to allow “not exceeding *six months’* wages or salary” to the servant, or clerk; a provision, which does not appear to me to include within its terms a mere *weekly* servant (d). The Commissioners have therefore, in my opinion, acted rightly, in refusing to make any order for the allowance of the six months’ wages in the present instance.

Sir J. Cross.—I also think, that this is not a case within the meaning of the statute. The guard of a stage-coach at weekly wages does not often, I should imagine, leave his wages unpaid for a period of six

(a) Mont. & M. 95.

(b) Mont. 264; and see *Ex parte Crawfoot*, id. 270.

(c) Mont. & M. 194.

(d) On the same principle it would seem, that a bequest of a *year’s* wages to each of the testator’s servants, over and above what may be due to them at the time of the testator’s death, has been held to apply to such servants only as are usually hired by the year; *Booth v. Deun*, 1 Mylne & K. 560.

1833.

Ex parte
SKINNER.

months; and the Lord Chancellor has decided, that workmen hired at weekly wages are not to be considered as servants, within this provision of the Bankrupt Act.

Sir G. ROSE concurred.

Petition dismissed.

Southampton
Buildings,
July 3.

Ex parte GREENHILL and another.—In the matter of
WILLIAM SELL.

The bankrupt, being indebted to the petitioners as the acceptor of two bills of exchange, entered into an agreement with them and *W. L.* that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of *W. L.* for sale. Held, that the petitioners might claim as equitable mortgagees, but subject to any prior lien of *W. L.*

THE petition in this case stated, that the fiat was issued against the bankrupt on the 19th June 1833; and that on the 23rd Feb. 1831, one *Wm. Pinnock* being indebted to the petitioners (as the executors of *Thomas Davison*, deceased,) in the sum of 201*l.* 18*s.*, for which sum they had a lien on certain goods or books of *Pinnock's* then in their hands, it was agreed between *Pinnock*, and the bankrupt, and the petitioners, that the petitioners should relinquish and give up their lien, in consideration of two several bills of exchange indorsed and delivered by *Pinnock* to the petitioners, bearing date respectively the 23rd February 1831, and each of which was made payable to the order of *William Pinnock*, and drawn upon, and accepted by the said bankrupt, one being for 100*l.*, at nine months after date, and the other for 101*l.* 18*s.*, at fifteen months after date; which bills were unpaid, and were then in the hands of the petitioners. As a further security for the

payment of these bills, it was also, by an agreement bearing date the 23d February 1831, and made between the bankrupt, the petitioners, and one *William Loaden*, agreed that the said two bills of exchange should be paid out of the produce of certain freehold and copyhold property belonging to the bankrupt in Hertfordshire: the deeds of which property were then in the hands of *Loaden*, for the sale thereof; and the bankrupt by that agreement directed *Loaden* so to apply the produce, which *Loaden* thereby agreed to do. It was further agreed, that if the property should not be sold at the maturity of the bills, in such case the deeds should remain in the hands of *Loaden*, as security for the payment of the same; to which stipulations *Loaden* also agreed. And it was likewise further agreed, that if the bills should be paid by any means before their maturity, 5l. per cent. for discount should be deducted therefrom.

The freehold and copyhold property mentioned in this agreement consisted of three freehold cottages, then let at the respective annual rents of 3l., 1l. 14s., and 1l. 19s., and of three copyhold cottages also let at the same annual rents.

The petition then alleged, that the deeds of this property, referred to in the said agreement, were still remaining in the hands of *Loaden*, who refused to deliver them up, either to the petitioners, or to the assignees of the bankrupt, claiming to retain them by virtue of some alleged lien: that such alleged lien had not any priority over the petitioners' claim, and that the same ought to be postponed to the claim of the petitioners under the aforesaid agreement; the

1833.

Ex parte
GREENHILL
and another.

1888.

Ex parte
GRANHILL
and another.

property being insufficient, as the petitioners believed, for the payment of their demand, and the costs of sale.

The petitioners prayed, that *Loaden* might be ordered to allow the assignees, or their solicitor, to inspect and take copies, or make an abstract, of the said title-deeds, and that the property comprised therein might be sold; that the petitioners' debt, and the costs and charges of this petition, and of the sale, might be paid out of the purchase-money, or as far as the same would extend, and that the residue (if any) might be disposed of in discharge of *Loaden's* lien (if any), and in payment to the assignees; and that the petitioners might prove, under the fiat, such surplus of the said debt, and the interest thereon (if any), as the produce of the sale should not be sufficient to satisfy; and that the petitioners might, in the first place, be paid the costs of this application, and those incidental to the sale, and the order to be made on this petition.

Mr. *Wright* appeared in support of the petition, and distinguished this case from that of *Ex parte Allison(a)*, as being one in which the estate of the bankrupt had an interest, which was not so in the case referred to.

Mr. *Wilcock, contra*. This application is made to the wrong tribunal, the petitioners having no *locus standi* in this Court, which has only authority to deal with the property of the bankrupt; but the matter now before the Court is merely a dispute between two creditors, in which the bankrupt's estate has no interest. It has been decided, that where there is a second mortgagee, who does not claim under the commission,

(a) 1 G. & J. 210.

but rests upon his security, whether it be a legal or an equitable mortgage, the Lord Chancellor has not power to compel him to join in the sale obtained by a prior mortgagee; *Ex parte Jackson*(a), *Ex parte Topham*(b). And in the present case Mr. *Loaden* does not claim under the fiat, but rests on his lien. It is by consent of the mortgagee only, that in ordinary cases a sale is ordered of the property mortgaged by a bankrupt. But supposing that the security given to the petitioners was a valid equitable mortgage, still, as the equity of redemption of this property is not in the bankrupt, this Court cannot interfere. The Court has therefore no jurisdiction to make the Order sought by this petition.

1833.

Ex parte
GREENHILL
and another.

Mr. *Wright*, in reply. As Mr. *Loaden* is an attorney of this Court, and has also made an affidavit in the matter of this petition, he is sufficiently liable to the jurisdiction of the Court, on the present occasion. He was the confidential solicitor of both parties, and he retains in his hands the deeds belonging to the mortgagee.

The COURT thought, that the agreement referred to by the petitioners amounted to an agreement by the bankrupt to deposit the deeds relating to this property, subject to any lien of *Loaden*; and that the usual Order ought to be made as in the case of an equitable mortgagee.

The Order made was, that the estate should be sold, without prejudice to the lien, if any, of

(a) 5 Ves. 357.

(b) 1 Madd. 38.

1833.

Ex parte
GREENHILL
and another.

Loaden; that the costs should be paid out of the proceeds of the sale, as in the ordinary case of the sale of property under an equitable mortgage; and that the bankrupt's assignees should have the conduct of the sale.

Southampton
Buildings,
July 4.

In the matter of WILKS.

The respondent not appearing when a petition was called on for hearing, the petitioner took such order as he could abide by. The Court refused the application of the respondent on a subsequent day, to restore the petition to the paper, where the only cause assigned for the respondent's non-appearance was, that his agent had overlooked the entry of the petition on the former occasion.

THE petition in this case, which was for liberty to prove a debt of 6000*l.*, had been set down for hearing in the paper for the 2d July; when the respondent not appearing, Mr. *Swanston*, for the petitioner, took such order on the petition as he could abide by.

Mr. *Koe*, on the part of the respondent, now applied to the Court that the petition might be restored. The excuse for the respondent not appearing on the former occasion was, that his agent had searched the petition paper, but had overlooked the entry of this petition. The petition had been answered for the 1st July, and was in the paper on the following day—an expeditious mode of proceeding, which was not universally practised, and therefore not likely to be known by the respondent on the present occasion.

The COURT refused the application, saying, that it ought not to depart from the practice it had laid down, when either of the parties to a petition neglected to appear; and that as the petitioner in this case had only taken such order as he could abide by, the respondent might move to discharge it, if the petitioner obtained an improper order.

1833.

Ex parte GRIBBLE.—In the matter of BOND and
PATESHALL.

Southampton
Buildings,
July 5.

THIS was the petition of an executor of one of the creditors of the bankrupt, praying that two sums of £. and £., standing in the name of the Accountant-General at the Bank of England, might be transferred to the petitioner.

It appeared that *C. B. Gribble*, the testator, had been the managing owner, or what is commonly called the ship's husband, of the ship *Princess Charlotte of Wales*, which had been chartered by the East India Company, and had received from the Company two warrants for the payment of the freight due upon the charter-party, for which he and *Sims*, another part-owner, gave a joint receipt to the East India Company. These warrants were lodged by *C. B. Gribble*, in his own name, in the hands of the bankrupts, who were bankers, but with whom he had not previously opened any account. The bankers received the money due on the warrants, and *Gribble*, from time to time, drew checks on them for various sums, part of the money so drawn for being for the use of the ship, and part for other purposes; among the latter was the sum of 3478*l.* for the use of his own son. After the death of *C. B. Gribble*, the testator, the balance remaining in the hands of the bankrupts was transferred by them to the credit of the petitioner, as his executor, in a new account opened with the executor; and the petitioner proved, as executor, for the amount of the balance due at the time of the bankruptcy. The two sums in the hands of the Accountant-General were the

The managing owner of a ship, chartered by the East India Company, receives the warrants for the freight, and pays them into a bankers' in his own name, drawing checks from time to time for various sums out of the proceeds, part of which are applied for the use of the ship, and part for other purposes. *Held*, that the other part-owners have no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors. *Dub.* Sir J. Cross.

1833.

**Ex parte
GRIBBLE.**

amount of two dividends, which had been declared upon such proof. The other joint owners set up a claim to this money, in proportion to the shares in which they were respectively interested in the ship. On a former occasion, when the matter was before the Vice-Chancellor, an order was made that all dividends payable on the proof made by the executor should be paid into the bank in the name of the Accountant-General, subject to further directions; and that the other joint owners should try their right to this money, by bringing an action at law against the bankrupts, as for money had and received to their use. This action was tried on the 20th December last, when the plaintiffs were nonsuited, on the ground that there was no proof that *C. B. Gribble*, when he lodged the warrants in the hands of the bankrupts, was acting as the agent of the plaintiffs; and the Court afterwards refused an application for a new trial.

Mr. *Swanston*, and Mr. *Rogers*, appeared in support of the petition, and referred to the case of *Sims v. Brittain* (a), which was an action arising out of a similar claim, made by the other part-owners of the ship, to a certain other fund in the hands of the defendants, who were employed by *C. B. Gribble* as his general agents. In that case it was held by the Court of King's Bench, on a motion for a new trial, that the plaintiffs could not sue the defendants as their debtors, as there was no sort of privity between them. The Court, in giving judgment, said, that "the money appearing to the credit of *Gribble* was subject to his sole

(a) 4 B. & Adol. 375.

disposition, and payable by the defendants to his order only ; and *the case is just the same, as if the defendants had been Gribble's bankers*, and by his direction, and for his convenience, had kept a separate account of one part of his funds. If the other part-owners, the plaintiffs, had been unwilling to trust *Gribble* alone with the money, *they* should have raised a separate account in their own names, or as owners of this ship, with the defendants ; and then they would have been responsible to them. That they have not done, and therefore they cannot treat the defendants as their debtors. They were debtors to *Gribble*, and are now responsible to his executors." The petitioner therefore is now entitled, on further directions, to have this money transferred to him as the executor of *C. B. Gribble*.

1883.

Ex parte
GRIBBLE.

Mr. *Wigram, contrà*. The decision of the Court of Law has not settled the question between these parties. When the case was before the Vice-Chancellor, he thought it so clear, that he did not hear the counsel for the other part-owners, but took it for granted that the fund arising from the money received on the East India warrants was money belonging to the ship. It was insisted by the other side, before the Vice-Chancellor, that the other part-owners of a ship are creditors of the managing owner, generally, giving him present credit,—and this by the general custom of merchants in London. But that does not affect the right of the owners to take advantage of any other circumstances, which may give them a claim on the particular fund. It is clear, that the original owner of property has a right to follow it, whatever change it may have subsequently undergone.

1833.

Ex parte
GRIBBLE.

The case of *Taylor v. Plumer* (a), and also the recent one of *Small v. Atwood* (b), establish the point, that you have a right to follow money invested in stock, which is afterwards transferred into the name of another party. This is consistent with the doctrine laid down in *Lord Chedworth v. Edwards* (c), where Lord Eldon granted an injunction to restrain the transfer of stock, standing in the name of a steward, on strong evidence that the stock was the produce of his master's property. If I can prove that a specific sum is the produce of my money, I have a right to attach that sum in a Court of Equity; and equity does not inquire into privity. The judgment of the Court of King's Bench is founded on the want of privity, and the intention of *Gribble* when he deposited the warrants with the bankers. If *Gribble*, as the managing owner, had kept the fund separate, then we should clearly have had a right to follow it. The affidavits do not establish any custom to prevent the part-owners of a ship from having a general lien on the specific fund paid to the managing owner for freight, notwithstanding the custom may be for them to give credit generally to the managing owner. It is very important to the interests of the part-owners, to make good their claim to this fund; as the estate of the bankers will pay a good dividend, while the estate of the testator is insolvent. There is a circumstance, also, not yet adverted to, which gives great weight to the claim of the other part-owners, namely, that *Gribble*, the

(a) 3 M. & S. 562.

(b) 1 Younge, 507.

(c) 8 Ves. 46. This case, however, makes rather against the argument of the learned counsel; for though Lord Eldon granted the injunction as to the stock, he expressly refused it, as to money at a banker's standing in the steward's name.

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testator, had never banked with the bankrupts previous to this transaction; which shows that the fund was intended to be deposited with them for the sole purposes of the ship. It would be perhaps advisable, under all the circumstances of this case, that the matter should be heard again by the Vice-Chancellor, who directed the action at law.

Mr. *Walker* appeared for the assignees.

Mr. *Swanston*, in reply. The ground on which the case of *Small v. Atwood* (a) was decided, was fraud; the contract for the purchase, in that case, being vacated for fraud on the part of the vendor. But in this case *Gribble*, the testator, was the lawful part-owner of this money, and it could not be taken out of his hands even in an action at law brought by the other part-owners. No question arises in this case, as to the identification, or non-identification of the property—it is all a matter of contract.

ERSKINE, C. J.—I confess, that I had some difficulty at first in determining this case; but, upon consideration, I think that the action at law has decided the whole question;—which turns upon what was the *intention* of *Gribble*, when he deposited the East India warrants in the hands of the bankrupts? For if he placed them there in his own name, I cannot conceive what right the other joint owners could have to claim from the bankrupts the money which they subsequently received upon the warrants. I am now considering the question distinct from all points relating to any custom that may exist

(a) *Supra*.

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between the managing owner and the rest of the owners of a ship, in their dealings with each other, and am now confining my view of the case solely to the *intention* of *Gribble*, when he opened an account with the bankrupts. Did he place the warrants with them, merely, as the agent of the other part-owners,—or were they paid in by him to his own individual credit, in order that he might draw for the money as he chose, and account for it afterwards to the other part-owners? Now, the fact of his intending to place this money in the hands of the bankrupts on the account of the other part-owners, is negatived by the result of the action at law; from which it must be inferred, that he placed the money in the bankers' hands, treating it entirely as his own. It appears to me, therefore, that the nonsuit in the action has decided the whole case.

Sir J. Cross.—The question is, whether this money ever became the separate property of *Gribble*,—or whether it was not deposited by him, with these bankrupts, with the intention of keeping it separate from all his other money, and for the purpose of composing a joint fund belonging to himself and the other part-owners of the ship. Has the fund, since it was paid in, become mixed with other money belonging to *Gribble*? On the contrary, it appears to have been kept quite distinct from his other funds, and no other money was mixed with it. Then the question is, can you identify the fund? I think the property is clearly identified. Nor does it appear to me, that the action at law can be said completely to decide the point. It was brought by the other part-owners against the bankers, and the Court of King's Bench decided that the action

would not lie, as there was no privity of contract between the plaintiffs and the defendants. But the point is now, is there not an equity between these parties, and one which this Court is authorized and bound to administer, in order to do substantial justice between them? I wish it to be understood, however, that I do not positively differ with his Honor the Chief Judge in the judgment he has already pronounced; for I do not now feel competent to express a decided opinion on the case, as I could have wished some further time to consider my judgment; my impression being, that the point of law, and the point of equity, are not identically the same.

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Sir G. ROSE.—This matter was well considered by the Vice-Chancellor, when he directed the action to be brought, for the purpose of ascertaining what claim the other part-owners had to this fund in the hands of the bankrupts; and I think, that the result of the action has satisfactorily disposed of the case. Was the money paid in to these bankers by *Gribble* controlled by any trust? By none whatever; it was placed to the sole account of *Gribble*, and was entirely subject to his order and disposal, by drawing checks in his own name on the bankers for different portions of it, whenever he thought proper. Suppose one of the ordinary cases of short bills. When a bill of this kind is indorsed by the payee, and deposited by him with a third person, if it is clothed with a trust, it cannot be disposed of by the holder; but, if subject to no trust, the bill may then be legally negotiated by the holder, although it may be fraudulent in him to do so. There was precisely the same relation in this case between *Gribble*,

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 — ship, as to the disposal of the East India warrants, as
 Ex parte between the holder of an indorsed bill, and the payee
 GRIBBLE. who delivers it to him so indorsed.

The Order made was, that the money in the Bank of England, and all future dividends to be declared on the proof made by the petitioner, should be paid into Court, to the credit of the suit in Chancery; with liberty to the petitioner, to proceed for the costs of the action. The assignees to have their costs out of the fund, and the petitioner to have all his costs in like manner.

Ex parte GEORGE TURVILL and others.—In the matter of STEPHEN MILLER.

Southampton
 Buildings,
 July 5.

An assignee, who was also a mortgagee, of the bankrupt's freehold property, having purchased it for himself when it was put up for sale, the estate was ordered to be resold, subject to any claims of the assignee by virtue of his mortgage.

The examination of the assignee before

the Commissioner, as to the sale of the property, was permitted to be read, as evidence of the assignee's misconduct,—the petition praying to discharge him for misconduct,—although it did not pray a resale.

When a petition has been half heard, it cannot be amended, on payment merely of the common costs of the day.

THIS was a petition for the removal of an assignee, and that he might be ordered to account, under the following circumstances, as stated in the petition.

The commission issued against the bankrupt on the 14th July 1819, describing him as a rope and sail maker, but which, the petitioners contended, ought to have further described him as a line and twine spinner and sacking cloth manufacturer; and the respondent, *William Neal*, was chosen sole assignee.

The petitioners were the executors of one *George*

Inwood, who was the surviving trustee under the bankrupt's marriage settlement, bearing date the 26th January 1811, and who had proved under the commission for the amount of 183*l*. The petitioners alleged, that they had discovered that the bankrupt in passing his last examination had made a mistake in the description of some of his property, describing his interest in it as reversionary, instead of absolute; and that though the bankrupt was not aware of what his real interest was in the property, yet that *Neal*, his assignee, was fully acquainted with the nature of such interest. This property was stated to be of the value of 1379*l*., subject to a mortgage made to *Neal* for *l*.; his household furniture was valued at 200*l*., and his book debts at 2200*l*.;—a share of a ship at 20*l*.;—his life interest in other property, in case he survived his wife, 20*l*.; and the good-will attached to the premises occupied by him, at 400*l*.; making in the whole 4920*l*. 13*s*. The amount of the debts owing by the bankrupt, at the time of his bankruptcy, was stated to be 2240*l*. 17*s*. 7*d*., which included three mortgages of different portions of the bankrupt's property, namely, one of a freehold messuage and land to *Neal*, the assignee, for 500*l*.;—one of a copyhold factory to *Sarah Harding* for 296*l*.;—and the other of a freehold field and rope-ground to Mr. *Barnard* for 100*l*.

The petitioners then alleged, that the bankrupt's estate ought, with proper management, to have paid 20*s*. in the pound, and have left a surplus; but that from the misconduct of the assignee it had only paid 6*s*. 10*d*. in the pound. On the 28th September 1819, the freehold and copyhold property was put up to auction, when the freehold house and land was bought

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in on the part of the assignee for 225*l.*;—the freehold field and rope-ground for 110*l.*;—and the copyhold factory for 400*l.* On the 1st May 1822, the freehold house and land, which was stated to be of the annual value of 68*l.*, was put up to sale again, when it was bought by the assignee for 115*l.*; upon which he put a relation of his into possession of the property as his tenant, who had occupied it ever since. The petition then charged, that the assignee proved 500*l.* under the commission, as the balance due to him for principal and interest on his mortgage debt, and received a dividend thereon of 6*s.* 10*d.* in the pound;—that he took possession of stock at the time of the bankruptcy to the value of 550*l.*,—that he had received book debts due to the bankrupt to the amount of 1000*l.*,—for the sale of the household furniture 96*l.*, and various other sums,—leaving a balance of 1031*l.* 9*s.* 7*d.* unaccounted for. And, after several other charges of misconduct urged against the assignee,

The petition prayed, that *Neal* might be discharged from his office of assignee, and another assignee appointed in his room, and that he might be prevented from voting in the election of the new assignee; that he might be ordered to pay to the bankrupt's estate a sum equivalent to the rental of the premises occupied by his relation; that the creditors might be at liberty to investigate his accounts; and that he might be ordered to make up any deficiency which might appear to exist, and to pay all costs.

Mr. *Montagu*, and Mr. *Keene*, appeared in support of the petition; and proceeded to read the examination of *Neal* before the Commissioner, in regard to the

sale of the bankrupt's freehold estate, which was alleged to have been purchased by himself.

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Mr. *Richards*, and Mr. *Russell*, for the assignee, objected to this mode of proceeding, as the petition did not pray a resale of the property.

ERSKINE, C. J.—They have a right to read the account given by the assignee of the transaction of the sale of the property, as evidence of his own misconduct; the petition praying to discharge him for misconduct.

Mr. *Montagu*. It is perfectly well known, that an assignee cannot, either directly or indirectly, purchase any part of the bankrupt's property for himself, without the sanction of the bankrupt's creditors, or the order of the Court. There is no question then, but that the estate must be resold. They may contend on the other side, that such resale must be subject to the assignee's mortgage; but in answer to this, we say that the assignee has waived his mortgage by proving his debt under the commission.

Sir G. ROSE.—The proper way will be for the Court to order this estate to be resold, subject to any claims of the assignee by virtue of his mortgage.

Note.—This suggestion was agreed to by the counsel on both sides.

Mr. *Montagu*. I come now to the second point, as to the assignee purchasing the bankrupt's stock. [Sir

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G. Rose. The order already made covers the whole prayer of your petition.] The prayer is to investigate the accounts of the assignee; but if the Court think that I am prevented from entering on the question of the purchase of the bankrupt's stock by the assignee, I must now apply to amend the prayer of the petition.

Mr. Richards objected to this being done in the present stage of the proceeding, unless more than the common costs of the day (which were 4*l.*) were paid.

ERSKINE, C. J.—The question is, after the hearing of this petition has been more than half gone through, whether the petitioners are not now at the mercy of the respondents, if the latter object to an alteration in the prayer of the petition. The counsel for the petitioners might have amended in the first instance, on paying the common costs; but not when the hearing of the petition has been so far proceeded with. In regard to the price given for the freehold estate by the assignee, it appears that the estate was put up to sale, subject to the rights of the bankrupt's wife, which the bankrupt stated himself; and this may probably have caused the estate to have been sold under its value.

The Order made was, that the freehold and copyhold property should be again put up to sale, subject to any claim of the assignee by virtue of his mortgage,—reserving all further directions and costs.



Ex parte MOLDAUT.—In the matter of GEORGE
HUNTER.

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Southampton
Buildings,
July 6.

THE petitioner in this case was the surviving partner of the house of *Renaudot* and *Moldaut*, who were the proprietors of extensive vineyards at Dijon, in France. In the year 1827, the bankrupt being at Paris met with *M. Renaudot*, the deceased partner, to whom he was previously well known, and made representations to him that he could effect advantageous sales of wines for his house in England. Upon the faith of these representations, Messrs. *Renaudot* and *Moldaut* constituted the bankrupt sole agent for the sale of their wines in England, agreeing to allow him 10% per cent. commission on the net produce of the sales, and 50% per annum for rent of office and cellar. He was not to guarantee debts, but was merely instructed to sell with prudence, avoiding whatever might cause anxiety. They paid for his licence, and agreed to remit the necessary funds to enable him to pay the duty on the wines, as they arrived in England. After entering into this engagement, the bankrupt returned to London, set up business in Albemarle Street, and the connection of principal and agent between himself and Messrs. *Renaudot* and *Moldaut* immediately commenced, and continued up to the period of his bankruptcy. The casks of wine consigned to him were all marked with the names of *Renaudot* and *Moldaut*, and the invoice accompanying each consignment was made out by them as owners of the wine. *Hunter* rendered them a monthly account of sales, and also another quarterly

A. in France employs *B.* in England to sell wines on commission, as well as to purchase other wines on *A.*'s account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold by *B.* in his own name. Part of the wines consigned by *A.* were in the dock warehouses standing in *B.*'s name, and part formed one indiscriminate stock in *B.*'s cellar. *A.* closes the connection with *B.* and requires him to deliver up all the wines, but *B.* neglects to comply with this requisition, and shortly afterwards becomes bankrupt.

Held, 1. That the Court had jurisdiction to order the assignees of *B.* to deliver up these wines to *A.* 2. That it was not a case of reputed ownership. 3. That *A.* might sue the purchasers of the wines, in the name of *B.* or his assignees. But 4, That no order could be made for the payment to *A.* of any monies, the produce of the wines, if mixed with the other monies of *B.* at the time of his bankruptcy.

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account, in which he charged his commission on the 'quarter's sales as agent or factor. A short time after his return to London, he wrote word to Messrs. *Renaudot* and *Moldaut*, that in order to facilitate the sale of their wines consigned to him, he must be able to accommodate his customers with other descriptions of wines; in consequence of which representation, they authorised him to make purchases of the required wines in London on their account, being anxious for a more extended sale of their own wines. For this purpose, they transmitted letters of credit to a considerable amount in favour of the bankrupt, addressed to *Firmin De Tastet & Co.*, and likewise guaranteed the payment of such wines as *Hunter* might purchase from Messrs. *Eade & Bell* in London. These wines were generally bought and sold in the bankrupt's name; but one instance occurred of a purchase of wine, where the seller drew bills on the bankrupt as "agent for *Renaudot & Moldaut*;" and there was another instance of a sale of wine, in which the purchaser was made by the bankrupt debtor to *Renaudot & Moldaut*. All the wines in the dock warehouses, however, stood in the bankrupt's name, and when they were removed to his own cellar, the permits were also made out in his name. The wines consigned by *Renaudot & Moldaut*, and the wines purchased by the bankrupt in England, formed one indiscriminate stock in the bankrupt's cellar. In November 1831 the bankrupt wrote to *Renaudot & Moldaut*, proposing to them to grant him a higher rate of commission and an increased annual gratuity, and saying, that if he could not succeed in improving his situation by his employment with them, he must do it with another. It did not suit

Messrs. *Renaudot & Moldaut* to accede to these terms; and in May 1832 M. *Moldaut* came to this country for the purpose of winding up the concern, when he received intelligence of the death of his partner, M. *Renaudot*. On the examination of the bankrupt's accounts, it appeared that there was a balance of £000^l. due from him to the petitioner; which, being wholly unable to pay, the petitioner, in February 1833, required him to deliver up the stock of wines remaining in his hands, the value of which was about 1700^l.; and he urged him at the same time to get all the outstanding accounts settled, the petitioner also exerting himself for the same purpose. Some of the wines in the docks were then transferred into the name of the petitioner, and a schedule taken of others; but the bankrupt continued to postpone the delivery of the remainder, under various pretences, and on the 22d March 1833 caused a declaration of insolvency to be filed at the Bankrupt Office, upon which he was on the 10th May declared a bankrupt; and his assignees afterwards took possession of the whole of the wines in the cellars at the bankrupt's house in Albemarle Street, and sent a notice to forbid the delivery of other wines lying at the warehouses of the St. Katherine's Dock Company.

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The petitioner prayed, that the assignees might be ordered to deliver up all these wines to him, as well as all monies in the bankrupt's hands, the produce of wines consigned to him by the petitioner and his partner.

Mr. *Swanston*, and Mr. *Bethell*, appeared in support of the petition. The most plausible objection, that may possibly be urged against the prayer of the petitioner, is, the want of jurisdiction in the Court to

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decide the question. [*Erskine*, C. J. Will the petitioner undertake to abide by the judgment of this Court, and not to bring an action, if this Court determines the question?—*Note*. This proposal being, after some demur, agreed to by the petitioner's counsel, the argument was resumed.] There is no doubt in this case, that the wines in the possession of the bankrupt were the property of the French house, nor can it be disputed that the bankrupt was largely indebted to that house. Then, the whole of the dealings between these parties being in the characters of principal and factor, the wines that continued in *Hunter's* possession at the time of his bankruptcy are not within the clause of reputed ownership in the Bankrupt Act (*a*); *Scott v. Surman* (*b*); *Ex parte Dumas* (*c*); *Tooke v. Hollingworth* (*d*). [Sir G. Rose. There is no difficulty about the law—but how do you distinguish the property?] [*Erskine*, C. J. How do you distinguish the wines in the cellar of the bankrupt's house in Albemarle Street?] In the case of a *factor*, it is enough if the property of the principal be identified by satisfactory evidence. There is no necessity to have a particular mark of ownership on every part of it. A bankrupt may execute a declaration of trust after his bankruptcy (*e*), or indorse a bill of exchange which he had engaged to do before his bankruptcy (*f*). So, in this case, the bankrupt was bound to deliver up the wines, which on the 22d April he identified as the property of the petitioner, and the delivery would have been good, notwithstanding a previous act of bankruptcy.

(*a*) 6 Geo. 4. c. 16. s. 72.

(*b*) Willes, 400.

(*c*) 1 Atk. 234.

(*d*) 5 T. R. 215; 2 H. B. 501.

(*e*) *Gardner v. Rowe*, 5 Russ. 258.

(*f*) *Ex parte Greening*, 13 Ves. 206, and the cases cited in the note.

But independently of the law of principal and factor, the 72d section of the statute, which relates to reputed ownership, only contemplates a possession by the bankrupt at the time of his bankruptcy, "*by the consent and permission of the true owner.*" Thus, where a man employed a coach-builder to make some alteration in his carriage, and after sending for it several times, the coachmaker became bankrupt; it was held, that the carriage was not in the bankrupt's possession at the time of his bankruptcy with the consent of the owner, and that the latter might maintain trover for it against the assignees; *Carruthers v. Payne* (a). And the same doctrine had been long before recognized by Lord *Hardwicke* in *West v. Skip* (b). So, in this case, there can be no consent of the true owner set up, as to the bankrupt's possession of the wines at the time of his bankruptcy, for the petitioner several times before the act of bankruptcy required the bankrupt to deliver up the wines. As to the permits of the wine being made out in the bankrupt's name, this is a fact perfectly immaterial, as it was the bankrupt's own act, and the petitioner was in no way privy to it. Nor does it in any way affect the question, in a clear case of principal and factor, that the bankrupt sold the wines in his own name to the different customers; for in a case of this kind Lord *Hardwicke* said, that he would have no difficulty in empowering the principal to sue the debtor in the name of the bankrupt and the assignees.

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Mr. *J. Russell* appeared for the assignees. The

(a) 5 Bing. 270.

(b) 1 Ves. 244.

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bankrupt carried on no other business whatever than that of selling and buying wines for the house of the petitioner, all which was done in his own name, as well as every other transaction in business; so that no such persons, as *Renaudot & Moldaut*, were ever known to any of the parties with whom the bankrupt dealt. We contend, therefore, that *Renaudot & Moldaut* carried on business here in the name of *Hunter*, the bankrupt; and that the property embarked by them in that business must be subject to the same liabilities as the property of any other bankrupt. [Sir J. Cross. Your proposition then amounts to this,—that all the dealings of *Hunter* were those of *Renaudot & Moldaut*, so that all their property in England is to be administered under the name of *Hunter*.] If I can show that *Renaudot & Moldaut* were solely interested in the trade carried on by *Hunter*, I shall then destroy the relation of principal and agent. To the world *Hunter* appeared to be the sole trader, but he was not so in truth; he was a mere cloak for the house of the petitioner. This was a fraud on the part of the petitioner. [Sir J. Cross. I understand, that the petitioner does not dispute any debt contracted by the bankrupt as agent for the petitioner.] That is not the case; for Mr. *De Tastet* has proved a debt under the commission for the amount of the duties on wines, the produce of which is now in the pocket of the petitioner. [Erskine, C. J. It appears, that notice was given by the petitioner to *De Tastet* in June 1832, of the dissolution of the connection between the petitioner's house and the bankrupt. Has Mr. *De Tastet* proved for any advances made by him to the bankrupt before that period?] To a large amount: there was also a por-

tion of the wines claimed by the petitioner, which the bankrupt had not paid for; for the price of which the seller has proved under the fiat. Some of the debts, arising from the re-sale of these wines by the bankrupt, the petitioner has likewise received, although the original purchase-money has never been paid. [Mr. *Swanston* here undertook, on behalf of the petitioner, to pay all the debts of this description.] If a man, who deals apparently on his own account, and in his own name, is a secret agent of another, then he cannot be considered in the character of a factor, within the case of *Copeman v. Gallant* (a). The principle of law is not disputed, that property consigned to a factor for sale cannot be pursued by his assignees; but in this case the bankrupt acted avowedly as a principal. No one knew him to be dealing as an agent for another, except Mr. *De Tastet* and Messrs. *Bell & Co.*, upon whom he had letters of credit. The stock of wines was all mixed in different bins in the bankrupt's cellars, and no name but that of the bankrupt was over the door of the house where the business was carried on. Suppose *A.* is secretly employed by *B.* to buy goods for him, and he sells them, and with the proceeds buys others, and so on till several debts are contracted on his own credit,—is *B.* at any period of time to come and claim the goods which *A.* has so purchased? [*Erskine*, C. J. That case is very different from this.] [Sir *J. Cross*. In this case the petitioner admits himself liable for all purchases made by the bankrupt before June 1832, but all those made subsequently he repudiates.]

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(a) 1 P. Wms. 314.

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Another question, however, remains to be considered, namely, whether this Court has any jurisdiction to make such an order as is sought by this petitioner? The true principle, as to the point of jurisdiction in these cases, is laid down by Sir *J. Leach* in *Ex parte Hippins* (a). "If assignees," he says, "are possessed of property as property of the bankrupt, which is claimed *upon equitable grounds* by third persons, the Court will, on petition, entertain the question, whether such property does, or does not, form part of the bankrupt's estate." Now, in this case, the claim of the petitioner does not proceed upon equitable grounds; if he has any claim at all, it can only be by action at law against the assignees. [Sir *G. Rose*. We cannot suffer the question of jurisdiction to be argued in a case, where the assignees of a bankrupt are required to do an act relating to property, which they have taken possession of, as assignees.] [*Erskine*, C. J. What becomes of all the cases of short bills, in which the claimant has also the legal right to bring an action, but in which the Court has uniformly exercised a jurisdiction over assignees, as the officers of the Court?] The truth would, however, in this case, be much better elicited in an action of trover, in which the assignees would be able to adduce more evidence to explain the whole nature of the dealing of the bankrupt, than they can possibly do in this Court. The case of the assignees is shortly this:—they say, that this house in France has practised a gross fraud on the bankrupt's creditors in England. To the great mass of the world *Hunter* appeared as a sole and independent trader, his dealings appeared to all the world as those of a wine merchant, trading on

(a) 2 G. & J. 95.

his own account, with a large stock in his hands, and gaining credit on that stock. Then comes the secret principal, and claims the very property which had gained him this false credit. It is contrary to all good faith in trade, that any one should thus put forth a man of straw, and then come and sweep away the whole property, which ought to be divided among the general creditors.

As to that part of the prayer of the petition, which relates to monies in the bankrupt's hands, the produce of wines consigned by the petitioner, these monies were mixed with his general funds, and must be taken to have been in his order and disposition, within the terms of the 72d section of the Bankrupt Act.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—The principle, on which the Court will interfere in a case of this description, is very plain and obvious, and one that has been acted upon in numerous instances. The jurisdiction of this Court is precisely the same, as that which the Lord Chancellor has been accustomed to exercise, when sitting in bankruptcy; and the principle on which that jurisdiction is founded is this, that assignees, in taking possession of the bankrupt's property, shall not so act as to work to the injury of other parties. The Lord Chancellor would exercise his discretion in matters of this kind, either by making an order on the assignees to restore property which they had illegally got into their hands, or by leaving the party claiming it to his remedy at law. In the cases of short bills, the reason why the Chancellor exercised his summary jurisdiction was, because the

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hardship was great, and the necessity urgent. In other cases, the urgency may have been less pressing. It is, however, the duty of this Court, to administer the most convenient remedy to a petitioner complaining of the conduct of assignees, instead of driving him to the more expensive and dilatory proceeding of a trial at law. The petitioner in this case alleges that the bankrupt was his factor, in selling and buying wines. Now, has the petitioner made out, that he is the lawful owner of the wines in the possession of the bankrupt at the time of his bankruptcy? I think he has, in general. But the Court may put the matter into other hands, to take care that the bankrupt does not get too much.

With respect to that part of the argument against the petitioner's claim, which is founded on the 72d section of the Bankrupt Act,—it must be clearly made out, that the property was in the possession of the bankrupt at the time of his bankruptcy, "*with the consent of the true owner,*" in order to give the assignees a title to retain it. But such was not the fact in this case; for the petitioner had long before, and up to the period of the bankruptcy, been exerting himself to get the wines out of the bankrupt's possession, and had made a formal demand of them. The case might rest there, without anything else to show in what character the bankrupt stood, whilst he had possession of these wines. But all the evidence, I think, proves clearly that the bankrupt was dealing with the property as a factor, and in no other character. The letter which the bankrupt wrote, in the first instance, to the petitioner and his partner,—and the answer sent by them to that letter, on the subject of the proposed purchase by the bankrupt of other wines for the accommodation of the customers,—

show very plainly the conduct of an agent corresponding with his principal.

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But then it has been argued, that this is either a case of secret partnership, or a case of fraud; for that *Hunter* was put forth by Messrs. *Renaudat* and *Moldaut* secretly to deceive the world, and obtain false credit. Now it appears to me, that the evidence entirely disproves any charge of that nature; for the French house gave him letters of credit, to a considerable amount, on *Bell* and Co., and Mr. *De Tastet*, to enable him to purchase other wines, and pay the duties of those consigned to him from France. Instead of any case of fraud, therefore, the foreign house took some pains to provide a fund for paying all persons of whom the bankrupt might purchase wines on their account.

With respect to the identity of the different wines, and the question, whether the wines so purchased by the bankrupt can be distinguished from those purchased on his own account, that will be a matter for further inquiry, which it will be advisable for the assignees to have examined into out of Court.

Upon the whole, then, I am of opinion that the wines which were consigned to the bankrupt by the petitioner's house, and which now remain in the bankrupt's possession, should be delivered up to the petitioner, as well as all such wines as have been brought by the bankrupt with the petitioner's money, or on his credit. And as to the outstanding debts owing to the bankrupt by any customers who have purchased these wines, I think the petitioner should be permitted to bring actions for recovery of these debts, in the names of the bankrupt and of the assignees. With respect to

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any bills or notes that may have been given to the bankrupt in payment for any such wines, all those that can be distinguished must also be given up to the petitioner. But in regard to any monies which are the produce of such wines, I think no order can be made, if they are mixed with the monies of the bankrupt.

Sir J. CROSS.—The assignees are justified, no doubt, in claiming all the property which they have reason to think belonged to this bankrupt; and no blame in this case is imputable to them, as they only acted on the bankrupt's suggestions. But the conduct of the bankrupt appears to me to be very derogatory to the character of a British merchant; and I cannot but blush for his character as an Englishman, when contrasted with the honourable conduct of the French merchant, who, at an early period of the Englishman's life, materially befriended him, and afterwards trusted him with thousands of pounds; in return for all which confidence he is now told, that he put him fraudulently into business, and that the petitioner himself was also a fraudulent dealer in London, carrying on business clandestinely under the name of another man. I hope it will be a long time, before a similar case again occurs to occupy the attention of this Court. What are the facts of this case? The petitioners have employed the bankrupt as their agent, for the purpose of selling their wines. The invoices, as well as the correspondence between the parties, clearly show, that the property consigned to the bankrupt was to be sold on the account of the petitioner and his partner. In June 1832 they revoked the authority, which they had given to the bankrupt; and he is now endeavouring to pay

his own creditors with the property of the foreign merchant. I entirely agree with his Honor the Chief Judge, that the petitioner is entitled to all the wines unsold, that were consigned to the bankrupt from the house at Dijon, as well as all those which were purchased by the bankrupt in London, with the money of the foreign house. If any of the stock is mixed, then, of course, it will be open to the assignees to inquire whether it is the property of the petitioner, or of the bankrupt.

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Sir G. ROSE.—I regret, that any imputation of fraud should have been brought in this case against the petitioner. No person can for a moment doubt, that the dealing between these parties was that of principal and agent. We are not left to affidavits alone, to learn the nature of their dealings; for their own letters clearly show what that was. When the connection, therefore, of principal and factor between these parties ceased, the petitioner was entitled to all his wines that continued in possession of the bankrupt, subject only to the bankrupt's lien on them for his commission, and other expenses incidental to his agency; and the bankrupt's assignees have no other right than the bankrupt himself had. His Honor then suggested the following

Order: that the petitioner be declared to be entitled to all such wines consigned by the petitioner and his late copartner, as were in the power or possession of the bankrupt at the time of his bankruptcy, and that the petitioner is also entitled to all such wines as were purchased with the monies of the petitioner, and his said

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copartner, or either of them, or on their or either of their credit; that the assignees do withdraw the notice they have given to the St. Katherine's Dock Company, not to deliver the wines in their possession to the petitioner; and that they do pay to the petitioner all such monies as they have received from the bankrupt, or any other persons, for the sale of any wines, the property of the petitioner. And that it be referred to Mr. Gregg, to inquire what wines now in the possession or power of the bankrupt, or the assignees, are the property of the petitioner.

Westminster,
November 5.

Ex parte WILLMENT.—In the matter of WILLMENT.

An order was refused to tax a messenger's bill, which had been paid five years ago, where there was no recent discovery of any fraudulent charge contained in it.

THIS was the petition of the bankrupt to tax the messenger's bill, upon the ground that it contained a fraudulent charge of 37*l.* 15*s.*, for keeping a box of papers relating to the bankrupt's estate for five months. It appeared, however, that the bill had been paid so far back as 1828.

Mr. *G. Richards*, for the respondent, objected that the application was too late after so long a period had elapsed since the bill was paid.

Mr. *Rogers*, for the petitioner, said that the delay was occasioned by the neglect of the solicitor, to whom the petitioner had delivered the bill five years ago for the purpose of taxation, and from whom he had great

difficulty in getting it back. In *Ex parte Neale* (a), where the charges in a solicitor's bill of costs were *primâ facie* exorbitant, it was ordered to be taxed, notwithstanding it had been paid, and the assignee had died who paid it.

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The COURT, however, thought that in this case too great a length of time had been suffered to elapse since the bill was paid; and that the fraud also alleged in the petition was one, which the petitioner must have been long acquainted with.

Petition dismissed with costs.

(a) Buck, 111.

Ex parte MAUDE.—In the matter of HUDSON.

Westminster,
November 6.

THIS was the petition of a creditor for a renewed fiat, under the 6 Geo. 4. c. 16. s. 26.; but it did not appear whether, or not, the debt of the petitioner amounted to 100%.

A renewed fiat can only be issued by a creditor, whose debt is sufficient to support the original fiat.

Sir G. ROSE.—A renewed fiat can only be issued upon the petition of a creditor, the amount of whose debt would be sufficient to support the original fiat. If that be so, the present application may be granted; if not, the petitioner may use the name of any other creditor, whose debt is of the requisite amount.

The rest of the COURT concurring, it was

Ordered accordingly.

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Westminster,
November 11.

A petition of assignees is informal, if signed by only one.

Semble, that such strictness is not now required as formerly, with respect to the attestation of a petition by the solicitor.

**Ex parte WHITE and others.—In the matter of
BRITTEN.**

THIS was a petition of the bankrupt's assignees, which was only signed by one of the three who were elected by the creditors (*a*), and although it was attested by a solicitor, the attestation did not describe him to be "*Solicitor to the petitioner in the matter of the Petition.*" When the petition was called on in its proper order,

Mr. *Montagu*, for the respondent, urged these two objections to the petition, and cited *Ex parte Rose* (*b*).

ERSKINE, C. J.—The last objection does not seem to apply so strictly as it formerly did; for since the alteration of the jurisdiction in bankruptcy, the solicitor for a petitioner is now a responsible officer of the Court. This was not the case before the passing of the Bankruptcy Court Act; for there was then no necessity for a man being a solicitor, in order to conduct proceedings in bankruptcy (*c*).

Mr. *Koe*, who was counsel for the petitioner, not being present, the matter was postponed till the rising of the Court; when no counsel appearing to support the petition, it was finally

Dismissed with costs.

(*a*) And see *Ex parte Morgan*, Buck, 109.

(*b*) 1 Deac. & Chit. 554. And see *Ex parte Clapham*, Mont. & M: 51.

(*c*) And see *Ex parte Smith*, 19 Ves. 473.

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Ex parte EMMA BRIGGS.—In the matter of **SAMUEL NOTLEY.**

Ex parte SAMUEL NOTLEY.—In the same matter.

*Westminster,
November 12.*

THE first of these petitions was an appeal by the petitioning creditor from a decision of the Subdivision Court, which refused to admit the proof of her debt, on the ground that it arose out of a partnership, or an usurious dealing between her and the bankrupt.

*A. lends B. money, to enable him to commence a trade, at five per cent. interest. After the loan, B. agrees to pay to A. one eighth of the annual profits, by monthly payments, which offer A. accepts, and B. accordingly makes several monthly payments, for which A. gives B. receipts on account:—
Held, that the balance of the principal and interest due from B. to A. was a good petitioning creditor's debt, not arising out of a partnership, nor affected by usury.*

The second petition was by the bankrupt, to annul the fiat, on the same ground.

The COURT ordered that the second petition should take precedence of the first, as the decision of the Court upon that petition would entirely dispose of the first.

It appeared that *Notley*, the bankrupt, being about to establish a chocolate manufactory in Gray's Inn Road, required an advance of capital for that purpose, and applied to Miss *Briggs* to lend him 230*l.*, which she agreed to do, upon the bankrupt giving her his bond for the payment of that sum in five years, with interest at five per cent. per annum. Upon the money being advanced, the bankrupt on the 2d November 1832 executed a deed of covenant, by which he bound himself to repay the money to Miss *Briggs* on the 2d November 1837, with interest in the meantime by half-yearly payments; and he also gave her a warrant of attorney, on which judgment was afterwards entered, and effected a policy of insurance for 300*l.* on his life, as an additional security. It being inconvenient, how-

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ever, to Miss *Briggs* to part with so large a sum of money, and as she represented that her current expenses came to about 5*l.* a month, the bankrupt engaged to pay her that sum every month in diminution of the principal, as was alleged in Miss *Briggs*'s petition,—but, according to the bankrupt's statement, in addition to the principal and interest. The only evidence, as to this fact, was to be obtained from the correspondence of the parties, which was as follows. The bankrupt on the 7th November 1832, in a letter addressed to Miss *Briggs*, said, “ I have now to certify, that independent of the five per cent. interest stipulated in the bond, I engage to allow you, for the term of five years, one-eighth of the net profits that may be derived from the chocolate manufactory, such portion of the profits to be drawn for by you as may best suit your convenience.” To which Miss *Briggs* on the 8th November replied, “ I am perfectly satisfied, and hope with you, it will be an arrangement to our mutual advantage. Would it not be an attraction, if you were to have on the chocolate papers the device of the Mexican Republic, like that of the White Gloves?” The bankrupt made these monthly payments until the 7th July 1833, when being unable to continue them, and being indebted to Miss *Briggs* in 203*l.* 9*s.* for the balance of principal and interest, she on the 27th July 1833 issued a fiat against him. Miss *Briggs* applied to prove this sum under the fiat; but the Commissioner, and afterwards the Subdivision Court, rejected the proof, on the ground that she was either to receive a share of the profits of the manufactory, and was therefore a partner with the bankrupt,—or, that the loan was made upon an usurious agreement.

In order to rebut this inference drawn by the Sub-division Court, Miss *Briggs* in her affidavit in support of her petition stated, that all the subsequent correspondence between her and the bankrupt treated the loan as a debt to be repaid with interest; that the bankrupt's proposal to allow her one eighth of the profits, was made by him voluntarily after the conclusion of the loan and the actual advance of the 230*l.* by Miss *Briggs*, and was never accepted by her, except by the general expressions in her letter of the 8th November 1832, nor acted upon by the bankrupt; but on the contrary, although he repeatedly stated that no profits had been made by him in his manufactory, he nevertheless continued to pay the monthly instalments of 5*l.* until the 7th July 1833, and for which payments Miss *Briggs* gave the bankrupt receipts on account generally, except for the first payment, which was stated to be on account as per agreement; and that no account was ever opened giving Miss *Briggs* credit for any part of the profits of the concern. Miss *Briggs's* agent, also, who negotiated the loan with the bankrupt, deposed, that he never understood that she was to have any share in the profits of the manufactory, until after the money had been advanced, when the bankrupt made a gratuitous offer to that effect.

Mr. *Montagu*, and Mr. *Lovat*, appeared in support of the petition to annul the fiat. From Miss *Briggs's* own affidavit, there was an undoubted partnership between her and the bankrupt; for her letter of the 8th November showed plainly that she entered, with some degree of interest, into the speculation proposed by

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the bankrupt,—and the advance of 230*l.* was for the purpose of forwarding such speculation. [Sir *J. Cross*. Supposing there was a partnership between these parties, still unless the debt arose out of a partnership transaction, would it not be a good petitioning creditor's debt? The debt in this case does not arise out of the partnership, even supposing there to have been one, but it is altogether antecedent to any partnership or trading.] [*Erskine*, C. J. There may certainly have been a partnership, and yet the debt may have been independent of any partnership. If you can prove that the 230*l.* was paid in as *capital*, and was not to be taken out of the concern until the partnership accounts were settled, you will then sufficiently connect the debt with the partnership.] In *Windham v. Paterson* (a), Lord *Ellenborough* says, “if the debt arise out of the transaction, which is the subject of the partnership with the bankrupt, it is not then a good petitioning creditor's debt.” Now, here we contend that the advance of the 230*l.* was the subject of the partnership with the bankrupt, as it was advanced for the very purpose of enabling him to carry on the business. [*Erskine*, C. J. There are two ways of putting it. You contend that the money was advanced, on condition that the bankrupt should pay 5*l.* per cent. interest for it, besides giving one eighth share of the profits. That is one way of considering the question. The other way is, that the loan was independent of any partnership, and that after the concoction of the debt, the bankrupt voluntarily paid a proportion of the profits.] There is still another mode of looking at the question. We say, that the loan was

(a) 1 Star. 144.

usurious; and that the transaction was either partnership, or usury. [Sir *G. Rose*. How can the bankrupt come here and apply to supersede, on the ground of usury, to which he himself is a party, except on the equitable terms of paying principal, interest, and costs?]

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Mr. *Ching*, who was with Mr. *Swanston*, on behalf of the petitioning creditor, said that the petition of the bankrupt had not put forward any charge of usury.

Mr. *Montagu* said, that the correspondence between the parties plainly showed that Miss *Briggs* was, in consideration of the advance of 230*l.*, to have a certain share of the profits of the business. He then referred to numerous letters which had passed between the parties; when

Mr. *Swanston*, on behalf of the petitioning creditor, objected to these letters being received in evidence, to contradict the terms of the deed of covenant, that had been entered into by the bankrupt when the 230*l.* was advanced (a).

Mr. *Montagu*. We do not offer this evidence to contradict the deed of covenant, but merely to explain it; and it has been decided, that evidence to ascertain an independent collateral fact may be adduced to explain an instrument, though not to contradict it; *Rex v. Scammonden* (b).

(a) See *Ex parte Morley*, 2 Deac. & Chit. 50.

(b) 3 T. R. 474, cited in *Rich v. Jackson*, 6 Ves. 337 n.; and see 1 Phil. on Evid. 583.

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ERSKINE, C. J.—There might have been an original contract between these parties, previous to the deed of covenant, that the money advanced should be repaid, and that a share of the profits should also be received; and then it might be reasonably contended, that the deed was only a part execution of the original contract, and that the parol agreement to pay one eighth share of the profits was made in pursuance of the other part of the contract.

Sir J. Cross.—My general impression is, that where there is a contract in contemplation between two parties, and the terms are afterwards reduced into writing, you cannot go out of the written contract.

Sir G. Rose.—The question is, whether the 230*l*. was advanced as capital of the partnership, and subject to the winding up of the partnership accounts;—or whether it was money lent by *A.* to *B.* to enable *B.* to carry on a separate trade, and in consideration of which *B.* afterwards agreed to pay to *A.* a certain share of the profits. Assuming, however, the fact of partnership to be established, it can only have been created by a participation of the profits, for there is nothing alleged in the petition of the money having been advanced as capital; and in whatever way the partnership was constituted, it would only exist in favour of third persons. But notwithstanding there may be an existing partnership between two persons, yet a loan of money from one to the other would create such a legal obligation as to form a good petitioning creditor's debt. In this case, however, there is also a bond and judgment. Now was there any thing that

could have controlled the petitioning creditor, instead of issuing a fiat against the bankrupt, from proceeding to execution on the judgment? As to the point of usury, has a bankrupt ever been permitted, in a Court of Equity, to contravene his own contract, on the ground of usury, without bringing into Court the amount of the principal sum lent, together with interest and costs? But there is no allegation of usury contained in the petition. That brings us back, therefore, to the first and principal question, namely, was the advance of the £300. an incident involving a partnership or not? And my opinion is, that it was not.

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Mr. *Montagu*, and Mr. *Lovat*, in continuation. The advance of money, in this case, made by Miss *Briggs* to the bankrupt, was the very foundation of the partnership; although there is no actual passage in their correspondence, which treats that sum actually as part of the capital to be employed in the business. The money advanced was intended to form part of the partnership funds,—it was for the purpose of carrying on a business, in which the bankrupt and Miss *Briggs* were to be jointly interested in the profits,—and is, therefore, not only a debt arising out of the partnership within the case of *Windham v. Paterson* (a), but the very essence of the contract, for the loan was the formation of a partnership; for it is clear, that it was part of the arrangement, that Miss *Briggs* was to share in the profits of the concern.

Mr. *Swanston*, and Mr. *Ching*, for the petitioning creditor, were stopped by the Court.

(a) *Supra*.

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ERSKINE, C. J.—There are some facts to be found in this case, which are perfectly undisputed, and which in my mind entitle the petitioning creditor to support the fiat. There are other facts so contradictory, that it is difficult to decide upon them; but it is unnecessary to go into those, if they would not vary the material parts of the case. The undisputed facts are these: Miss *Briggs* advanced 230*l.* to the bankrupt, on a bond and warrant of attorney for securing the repayment on the 2d November 1837, with interest at 5*l.* per cent.; this money was advanced to the bankrupt for the purpose of enabling him to establish a manufactory for chocolate. It is said, that this is not a good petitioning creditor's debt; as there was, besides the written documents, an agreement that Miss *Briggs* was to share in the profits of the manufactory, and that the loan, therefore, must be considered as a debt arising out of the partnership. Now, I have always understood the distinction to be this: if the transaction between two partners is intended to form an item in the partnership accounts, then you cannot say that there is a legal debt owing from one to the other, until a balance is struck, after taking the partnership accounts. But after an account has been taken, and a balance struck, then, although the partnership continues, the amount of the balance will be proveable under a commission, or be a good petitioning creditor's debt. The cases, in which the objection of a partnership has been allowed to prevail, are those in which money is actually brought into the partnership account, and where it would depend, upon taking the account, whether the sum was due or not from one partner to the other. But, in this case, I think there is not sufficient evi-

dence of a partnership. Conceding, however, that there was a partnership, the debt here is perfectly distinct from any partnership accounts. Although Miss *Briggs* was promised an eighth share of the profits, this engagement appears to have been made after the loan of the money, and was not stipulated for by her previous to the advance of the money. The money was to be repaid at all events, and there is nothing to show that it was intended to form an item in any partnership accounts. It is clear, therefore, that there was no contemplation of a partnership between these parties, but that the real object of Miss *Briggs* was to obtain, if she was able, more interest than 5*l.* per cent.

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Sir J. Cross.—This is a petition of the bankrupt to supersede the fiat, on the ground that the petitioning creditor was his partner in trade. But, as his Honour the Chief Judge has already stated, there was no contemplation of any partnership in fact. It is true, that if *B.* agrees to give *A.* a share in the profits of his business, the Court may consider them *quasi* partners, for all purposes of responsibility to third persons. But *B.*, after borrowing money of *A.*, cannot turn round upon him and say, “you are my partner, by operation of law,” and therefore I will not pay you your debt. This would not be permitted by any Court, either of law, or equity. But even if there was a partnership between these parties, I think that this debt was independent of any partnership transaction, and is quite sufficient to enable a petitioning creditor to sustain a fiat. It appears to me, however, that there was no partnership in fact.

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Sir G. ROSE.—The usual order is, that the costs shall come out of the estate. But I, for one, should have been very glad on this occasion to have given the costs against the bankrupt personally.

Petition dismissed.

Lincoln's Inn
Hall,
August 15,
1833.
Cor. Lord
Chancellor.

Ex parte ROBINSON.—In the matter of HOUGHTON
and WATTS.

One of two partners accepts bills for a previous partnership liability, after his co-partner has committed an act of bankruptcy. Held, that these bills were, in the hands of a *bond fide* holder, proveable against the joint estate, under a subsequent commission issued against both partners.

THIS was an appeal from the decision of the Court of Review in *Ex parte Ellis* (a), upon the following

SPECIAL CASE.

Previously to the issuing of the commission herein after mentioned, the bankrupts carried on business in Soho Square, as drapers and co-partners, under the name and firm of *Houghton and Watts*.

On the 4th of January 1832 the said *James Houghton* absconded, and committed an act of bankruptcy. Upon the following day the said *John Watts* accepted, in the names of the firm, and delivered to *Evan Davies*, three bills of exchange, of which the following are copies:—

£500.

London, Dec. 31, 1831.

Two months after date pay to my order five hundred pounds, value received.

Evan Davies.

To Messrs. *Houghton and Watts*, Soho Square.

(Accepted)

(Indorsed)

at

Pay Mr. *W. Robinson* or order,

Messrs. *Prescott, Grote, and Co.*

Evan Davies,

Houghton and Watts.

W. Robinson.

(a) 2 Dea. & Ch. 555.

£750. London, Dec. 31, 1831.
Two months after date pay to my order seven hundred and fifty pounds, value received.
To Messrs. Houghton and Watts, Soho Square.
(Accepted) (Indorsed)
at Pay Mr. W. Robinson, or order,
Messrs. Prescott, Grote, and Co. Evan Davies,
Houghton and Watts. W. Robinson.

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£300. London, Jan. 2, 1832.
Two months after date pay to my order three hundred pounds, value received.
To Messrs. Houghton and Watts, Soho Square.
(Accepted) (Indorsed)
at Pay to Mr. W. Robinson, or order,
Messrs. Prescott, Grote, and Co. Evan Davies,
Houghton and Watts. W. Robinson.

The said bills were not drawn on the days on which they respectively bear date, but on the 5th of January 1832, and were accepted and delivered by the said *John Watts* as a security for liabilities contracted by the said *Evan Davies* upon certain bills of exchange, before the said 4th day of January, accepted by the said *Evan Davies* for the accommodation of the said bankrupts, and which bills were then outstanding in the hands of third parties. When the three bills above set out were so given to the said *Evan Davies*, he knew that the said *James Houghton* had absconded, and had committed an act of bankruptcy.

On the same day the bills were indorsed by the said *Evan Davies*, and remitted to one *William Robinson*, and by the said *William Robinson* placed to the credit of the said *Evan Davies* in account.

At the time of such remittance the said *Evan Davies*

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was indebted to the said *William Robinson* in the sum of 2000*l.*, and the said bills were *bonâ fide* so credited by the said *William Robinson*, in ignorance of the circumstances under which they had been accepted, and without notice of the act of bankruptcy having been committed by the said bankrupts, or either of them.

On the 6th of January the said *John Watts* also committed an act of bankruptcy.

On the 10th January a commission of bankrupt under the Great Seal of Great Britain was issued against the said *James Houghton* and *John Watts*, under which they were declared bankrupts; and *Wynn Ellis*, *Andrew Caldecott*, and *William Dean*, were chosen assignees.

The said *William Robinson* tendered the said three bills of exchange for proof under the said commission, against the joint estate of the said bankrupts, and the proof thereof was admitted by the Commissioners.

The said *Wynn Ellis*, *Andrew Caldecott*, and *William Dean*, in the month of November 1832, presented their petition to the Court of Review, praying that the said proof of the said three bills of exchange, amounting to the sum of 1550*l.*, so made by the said *William Robinson*, might be expunged; and on the 14th of February 1833 the said petition came on to be heard before the said Court.

The Court was of opinion, that the said *William Robinson* was not entitled to prove the said bills, or either of them, against the joint estate of the bankrupts; and therefore ordered the proof to be expunged accordingly, and that the costs of the petitioners and respondents should be paid out of the estate of the bankrupts.

The question is, whether, under the circumstances aforesaid, the said *William Robinson* was entitled to prove such bills against the joint estate of the bankrupts?

Approved of and certified by me,
14 March 1833.

T. Erskine, C. J.

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Sir *Edward Sugden*, and Mr. *G. Richards*, appeared in support of the appeal. The question is, whether, after one of two partners has committed an act of bankruptcy, the solvent partner can bind the firm by accepting a bill of exchange in the name of the firm for a partnership liability; and whether a bill so accepted is, or is not, on the bankruptcy of both partners, proveable in the hands of a *bonâ fide* holder against the joint estate. In considering which question, two other points are involved;

1. Whether, in the ordinary case of a secret dissolution of a partnership, the power of one partner exists so as to enable him to make his co-partner liable.

2. Assuming that he has that power, whether there is any difference in this respect, when the dissolution of the partnership is caused by the secret act of bankruptcy of one of the partners.

With regard to the *first* question, there is no doubt but that any one partner may bind the firm, so as to render all the members of it jointly liable to a party who has no notice of the dissolution, *Osborne v. Harper* (a), *Goode v. Harrison* (b), *Williams v. Keates* (c). In *Goode v. Harrison* this was held, notwithstanding the retiring partner was an infant, and had ceased to act

(a) 5 East, 225.

(b) 5 B. & Ald. 157.

(c) 2 Stark. 290.

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as a partner after he came of age. Lord *Tenterden*, in giving judgment in that case, says "If once a person holds himself out as being a partner, till he gives notice he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership, may consider him as such, and he is bound by that representation. It is not necessary, in fact or in law, that, to create a legal obligation, a partnership should be still continuing. The legal obligation may arise from the acts of the party. Here, during infancy, the defendant acts as partner, and when he comes of age he forbears to inform the world that he was not so." The mere dissolution of a partnership, therefore, does not extinguish the liability of the retiring partner for the acts of his co-partners, unless due notice is given of the partnership having been dissolved.

With respect to the *second* question, namely, whether there is any difference in this respect, when the dissolution of the partnership is caused by the secret act of bankruptcy of one of the partners; it is submitted, that there is no difference either upon principle, or upon authority, although some dicta on the subject may be thought to be conflicting. If the principle is considered, there can be no distinction recognized between the ordinary case of a dissolution by agreement between partners, and a dissolution by an act of bankruptcy. In each case the dissolution is occasioned by the act of the party, though in the latter case the operation of law is superadded. And if the secret act of bankruptcy of one partner deprived the other partner of all power to accept or pay a bill in the name of the firm, to satisfy a partnership liability, the consequence would be, that upon an act of bankruptcy being committed by one partner, the partnership must

stop, and the solvent partner would,—as was forcibly remarked by Lord *Tenterden*, then Mr. Justice *Abbott*, in the case of *Harvey v. Crickett* (a),—“be ruined in the midst of abundance of property capable of paying all the debts.”

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The authorities also are clear, that a solvent partner has, after the bankruptcy of his co-partner, dominion over the partnership property. This appears from the cases of *Fox v. Hanbury* (b), *Smith v. Oriel* (c), *Coldwell v. Gregory* (d), and the case already mentioned of *Harvey v. Crickett*, where it is laid down, that a payment by a solvent partner is valid, notwithstanding the previous act of bankruptcy of his co-partner. Then, if the payment of a partnership debt by the solvent partner is valid, *à fortiori* may the solvent partner, for the same purpose, draw or accept a bill; *Ramsbottom v. Lewis* (e), *Lacy v. Woolcott* (f), *Craven v. Edmondson* (g).

But it has been contended, that there was a severance of the partnership, by relation, from the time of the act of bankruptcy, and that as after such severance there could be no joint property, no joint debt could therefore be contracted. [Lord *Brougham*, C. That is, because a third party, namely, the assignees, had been introduced.] Yet, if that were so, there could be no joint estate to be administered under the commission. Suppose there had been no bankruptcy in this case, the joint property, or the separate property of each partner, might then have been taken in execution under a judgment in a joint action against both the partners. Now, the only difference in bank-

(a) 5 M. & S. 343.

(b) Cowp. 445.

(c) 1 East, 368.

(d) 1 Price, 129.

(e) 1 Camp. 278.

(f) 2 Dow. & R. 460.

(g) 4 Moore & P. 627; 6 Bing. 737.

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ruptcy is, that the right of the creditor is limited upon a joint debt, by compelling him to resort to the joint estate; which the assignees must keep distinct, for the liquidation of the joint debts; the joint property continuing the same in the hands of the assignees, as it was before the bankruptcy.

It may be said, that there is a distinction between the transfer of property, and the creation of a joint liability by the solvent partner. It is admitted, that before the 49 *Geo. 3. c. 125. s. 2.* a debt contracted after an act of bankruptcy, was not proveable under the commission; but by the provisions of that statute, the right of proof was not to be defeated, unless the creditor had notice of the act of bankruptcy at the time of contracting the debt. And the same provision is incorporated in the 6 *Geo. 4. c. 16. s. 82.*, whereby all payments *bonâ fide* made by, or to any bankrupt, are declared to be valid, notwithstanding a prior act of bankruptcy; “provided the person so dealing with the bankrupt had not, at the time of such payment, notice of such act of bankruptcy.” The same principle also applies to cases of set-off and mutual credit; *Hawkins v. Whitten (a)*, *Dickson v. Cass (b)*.

For these reasons, it is submitted, that the decision of the Court of Review is erroneous, and that the creditor in this case is entitled to prove against the joint estate.

Mr. *Swanston*, and Mr. *Montagu*, for the respondents. The question is not, as stated on the other side, whether the solvent partner has dominion over

(a) 10 B. & C. 217.

(b) 1 B. & Adol. 355.

the partnership effects after the bankruptcy of his co-partner, but against what estate the appellant is entitled to prove these bills. The cases, therefore, which have been cited in support of the authority of a solvent partner to deal with the partnership property, have no application to this case. The only question here is, whether one of two partners, after the bankruptcy of the other, has the power to create a new joint liability by accepting a bill of exchange in the partnership firm, so as to entitle the holder of the bill to prove against the joint estate. No case goes the length of such a proposition; but, on the contrary, there are many decisions opposed to it; and notwithstanding many of these have been on questions occurring at *nisi prius*, yet their authority has not been impugned in any case in which they have been cited in support of the doctrine they lay down.

What we contend for in the present case is, that there was no existing partnership when these bills were accepted by *Watts*,—and that the assignees, as soon as they were appointed under the joint commission, became by relation tenants in common with the solvent partner of the partnership effects, leaving him no authority whatever to do any act binding on the assignees; for, as Lord *Eldon* observes in *Dutton v. Morrison* (a) “it is not the property of *A.* and *B.*, but the joint property of *A.* and the assignees of *B.*” This doctrine is also supported by *Ex parte Ruffin* (b), *Ex parte Wait* (c), and numerous other cases. Thus in *Kilgour v. Finlayson* (d) it was decided, that a joint liability cannot be created by the act of one party, if

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(a) 17 Ves. 197.

(b) 6 Ves. 119.

(c) 1 Jac. & W. 605.

(d) 1 H. B. 155.

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the other party has no joint interest with him in property, upon which the liability can attach. So in *Abel v. Sutton* (a), where, on the dissolution of a partnership, one of the partners was even authorized to settle the partnership affairs, Lord *Kenyon* held, that he could not indorse a bill in the name of the partnership firm, so as to bind the other partners, notwithstanding it was for the express purpose of liquidating the partnership debts. And the same doctrine was held by Lord *Ellenborough* in *Wright v. Pullen* (b), where a bill was accepted by one partner after the partnership was dissolved, although the indorsee took the bill, without notice of that fact.

The cases of *For v. Hanbury* (c), and *Smith v. Oriel* (d) have been cited on the other side, to prove that a solvent partner has dominion over the partnership property after the bankruptcy of his co-partner; but they also establish the proposition we contend for, that after an act of bankruptcy committed by one partner, followed by a commission and assignment, the partnership is dissolved, by relation, from the time of the act of bankruptcy. And with respect to *Lacy v. Woolcott* (e), which has also been relied on, that case was decided on very special grounds, and by no means warrants the general proposition which is now contended for; for there the bankrupt partner and the solvent partner had, after the act of bankruptcy, recognized their liability, by holding themselves out as partners to the world.

Sir *Edward Sugden* in reply. It has been con-

(a) 3 Esp. 108.

(b) 1 Star. 375.

(c) Cowp. 450.

(d) 1 East, 398.

(e) 2 Dow. & R. 460.

tended, that a solvent partner cannot, after the act of bankruptcy of his copartner, bind the estate of himself and the assignees of the bankrupt partner. This may be true in regard to a subsequent debt; but in this case the acceptances were given by *Watts* in satisfaction of a pre-existing joint demand by *Davies* against *Houghton* and *Watts*, in pursuance of a previous engagement he had entered into for their accommodation. The cases of *Kilgour v. Finlayson*(a), and *Dutton v. Morrison* (b), which have been relied on in support of the position contended for by the other side, namely, that the appellant in this case, though a joint creditor, cannot follow the joint property, because the bills were accepted by *Watts* after the act of bankruptcy of his partner,—were all decided before the 49 G. 3. c. 135.; since which statute the rights of a party can only be affected by notice of the act of bankruptcy. That there is a valid debt, in this case, is not disputed, though the right of proof is denied. It is admitted, also, that a solvent partner may deal with the partnership property after the bankruptcy of his co-partner. Then if he may thus deal with the property to pay a partnership debt, why may he not accept a bill for the same purpose? *Ex parte Ruffin* (c), which has been cited in support of the argument for the appellant, serves only to show, that where there is an alteration in the firm of a partnership, and the stock is transferred by the old to the new firm, the creditors of the old firm have no right in preference to those of the new firm. Then with respect to the equity of the case,—whatever equities may have existed as against *Davies*, these cannot affect the right of *Robinson*, who

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(c) 6 Ves. 119.

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took the bills in the regular course of business, without notice of any equities, or of the act of bankruptcy. If the argument on the other side was to prevail, there could be no dealing with any partnership, without a previous inquiry whether one of the partners had not committed an act of bankruptcy.

Cur. adv. vult.

LORD BROUGHAM, C.—The question which arises in this case is of great importance, and is one on which conflicting dicta, rather than decisions, are to be met with in the books. It is, whether or not a solvent partner in a firm, one of whom had committed an act of bankruptcy, can bind the firm by his acceptance of a bill of exchange for a partnership debt,—the bill having been subsequently indorsed to a *bonâ fide* holder for value, without notice of the act of bankruptcy.

The firm of *Houghton* and *Watts* were liable to *Davies* upon bills outstanding, which had been accepted by him for their accommodation; and after *Houghton* had committed an act of bankruptcy, *Watts*, being cognizant of that fact, gave *Davies* the acceptance of the firm, which *Davies* afterwards indorsed to *Robinson*. *Watts* afterwards became bankrupt, and a joint commission issued, under which *Robinson* sought to prove against the joint estate. The Commissioner, before whom the point was raised, allowed the proof; the Court of Review ordered it to be expunged; and the question comes here on a special case, stating in effect the case which I have now given in substance.

It must be admitted, that the consequences would

be most unfortunate, were it still to be the law, that the *bonâ fide* holder of a bill accepted by a firm could not prove on it, because it turned out to have been accepted after a secret act of bankruptcy committed by one of the partners. The extent to which this position is put, and its mischievous tendency, need not to be pointed out.

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The ground of the decision below appears to have been, that the bankruptcy dissolving the partnership, the assignees are, by relation, tenants in common with the solvent partner, from the time of the act of bankruptcy; so that nothing done by the solvent partner, without the concurrence of the assignees, can, from that moment, bind the joint property. In the very short note of the reasons given by the learned judges below, that is the ground of the judgment. But from thence another inference of a wholly different nature must be drawn before I can arrive at the same conclusion with that of the Court below,—namely, that because of the tenancy in common the solvent partner cannot bind the property of the firm, therefore he cannot render the firm liable by his contracts with parties ignorant of the dissolution and bankruptcy, even although these contracts relate to prior liabilities of the firm.

That bankruptcy dissolves a partnership when a commission issues, and there is an adjudication and assignment, and that the cesser of the partnership connection takes place from the act of bankruptcy by relation, as a general position, is unquestionable; but that it has every effect of a dissolution,—that it determines the partnership by relation, to all intents and purposes, and makes it as if no such connection had ever subsisted, is not law. The dissolution being

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unknown to the world, all men are safe in contracting with the firm. No one can doubt, that if two parties secretly agree to dissolve their partnership on the 1st of January, entering into a regular instrument of dissolution, and yet go on trading together as before, either may validly bind both on the 1st of February, by accepting a bill in the partnership name, and paying it away to a party ignorant of the dissolution. Does the circumstance of the dissolution having been effected by bankruptcy make any difference in the position of the *bonâ fide* and ignorant holder? The case, as decided below, can only rest on the supposition that this does make a difference, by letting in the assignees as tenants in common of the solvent partner. But suppose them so as regards the property, it does not prove that their being so let in, prevents the solvent partner from binding the firm, by contracting a new liability for an existing debt of the firm. Suppose there had been no partnership at all,—that the bankrupt had been a sole trader,—had accepted the bill himself,—and had paid it to one ignorant of his having committed an act of bankruptcy,—it is clear, that the holder could have proved. The bankrupt could not have validly transferred property after his act of bankruptcy, unless within the statutory exception. He could not have indorsed the acceptance of another person, so as to give his indorsee an action against the acceptor; but he could bind himself, the indorser, by that indorsement, in case the bill was dishonoured; and his acceptance would certainly bind him in the hands of an innocent holder, and entitle such holder to prove under his commission. It can make no difference, that the acceptance is by the solvent partner of a firm,

and not by the bankrupt himself; the acceptance binds both, unless the bankruptcy is known. The indorsement by *Davis* to *Robinson*, in this case, puts him in the position which I have been assuming. The party receiving the bills stands in the place of the innocent holder; if it be clear,—which indeed cannot for a moment be questioned,—that, on a secret dissolution without bankruptcy, an innocent holder of the partnership acceptance given by one partner could sue both. But ought the bankruptcy, which takes one partner out of the firm, to place that innocent holder in a worse situation,—or ought it to place the assignees of the partner going out in a better situation, than he could himself have been in? It might rather be contended the other way, at least that there is a reason more in favour of the holder, where the secret act does not complete the dissolution, than where the dissolution is completed before the acceptance was given; for, in truth, the act of bankruptcy is only an inchoate dissolution, to be perfected by the assignment under the commission; and it would be difficult to show why a party, who takes the acceptance of a firm during the interval between the inception and completion of the severance, and at a time when events might prevent the completion altogether, should be in a worse situation than if he had taken it after the severance was completed, and the partnership wholly determined.

If we look to the cases, we shall find, that while there are none directly against the view which I take of this question,—while at law there is no case either directly or indirectly against it,—and while there is a current of authority plainly in its favour,—yet there are one or two cases, which proceed upon principles

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not easily reconcileable with others of high authority and recent date. The only case in Banc that I know of, which materially differs from *Harvey v. Crickett* (a), is that of *Thompson v. Freere* (b), where it was held, that an indorsement by two partners, after acts of bankruptcy committed by them, did not transfer the partnership interest in an acceptance, separate commissions having afterwards issued against them, and the solvent partner being abroad, and ignorant of the whole transaction. It must be observed, however, that in this case the Court only granted a rule for a new trial, being of opinion that the facts were not well ascertained, and that some of the matters of law, which the case involved, required more deliberate consideration. And it does not appear ever to have been afterwards brought under the notice of the Court, although the reported case has been again and again referred to, and particularly was urged on the Court as an authority in *Lacy v. Woolcott* (c), without effect, as it did not bear directly on the point then before the Court. Then the decisions in *Dutton v. Morrison* (d), and *In the matter of Wait* (e), are relied on, as evincing a disposition to question the principles of the latter cases at law, and as authorizing a different distribution of the partnership estate from that to which those cases would lead. But it must be observed, that Sir William Grant, in *Brickwood v. Miller* (f), appears to have thought the principle was carried too far in *Dutton v. Morrison*, as it should seem from his observations, particularly those stated in p. 281 of the report; and, at any rate, that the cases, as well here, as at Nisi

(a) 5 M. & S. 337.

(b) 10 East, 418.

(c) 2 Dow. & Ry. 460.

(d) 17 Ves. 197.

(e) 1 Jac. & W. 605.

(f) 3 Mer, 275.

Prius and in Banc, are reconcilable, if not with each other, certainly with the opinion which I have formed on the present question,—by the distinction which may, if necessary, be taken between an act assuming to transfer the property of the firm, and one making a contract by acceptance for a previous debt of the firm. And it is perfectly consistent with the proposition,—that the solvent partner cannot validly transfer the partnership property after the bankruptcy,—to maintain, that he may validly bind the firm by his acceptance given to a party ignorant of the bankruptcy (a). So that it is no impeachment of the proposition, that by indorsing a bill payable to the firm the solvent partner cannot pass that bill, or bind the firm by the indorsement. This distinction plainly reconciles *Thompson v. Freere* (b) with the judgment I have now given, and also reconciles it with *Lacy v. Woolcott* (c); for in *Thompson v. Freere* the bankrupts were the indorsers, and the bill, though drawn by them, was an acceptance of a debtor to the firm; and the question was, whether this indorsement could operate as a legal transfer of the bill to the indorsee, because the bankrupt had no longer any power of binding the joint property, from the moment that the assignment relating back had vested the property in the assignees, as at the date of the act of bankruptcy. It was a question, therefore, not as to the liability of the firm on the indorsement of the two partners, but as to the right of the holder to retain the bill which was assumed to be passed by that indorsement—a right, not against the firm, but a right to the

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(a) But in this case *Davies* knew that *Houghton* had committed an act of bankruptcy, when *Watts* delivered to him the acceptances in the name of the partnership firm.

(b) *Suprà*.

(c) *Suprà*.

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bill pretended to be passed by that indorsement. Now it is in nowise inconsistent with this position, or the reasoning on which it rests, to hold that the bankrupt,—still more the solvent partner,—might bind the firm to an innocent holder, either by passing its own acceptance, or indorsing another person's in favour of that holder.

Then let us consider the cases which bear most immediately on the point in question, and which have never been controverted. In *Fox v. Hanbury (a)*, Lord *Mansfield* held, not only that if partners dissolve a partnership, they who deal with either, without notice of such dissolution, have a right against both,—of which indeed there can be no doubt,—but further, that after dissolution by bankruptcy, the party out of possession of the partnership effects has the same lien on any new goods brought in, which he had on the old; and he held, and the Court decided, after full consideration, that the *bonâ fide* vendee of partnership property by the solvent partner, after an act of bankruptcy committed by another partner, can hold that property against the assignees under a joint commission issued against both. To maintain the doctrine on which my opinion in the present case is founded, there is no occasion to go so far; because the question here only relates to the liability of the partnership from the contract of the solvent partner,—and not to the title given by him in the partnership property. But that the decision of the present case is involved in that determination of *Fox v. Hanbury*, as the lesser is involved in the greater, and that the judgment in review cannot stand along with that, can admit of no doubt. The late case of *Lacy v. Woolcott (b)*, appears

(a) Cowp. 450.

(b) 2 Dow. & R. 460.

to have been brought under the notice of the Court below, having been cited by one of the learned judges there when the case first came on, but respecting which I find no mention either in the judgment or in the report, except an allusion to it by the counsel in argument, who endeavoured to distinguish it from the case then before the Court; it seems indeed to have been treated as if it were of no authority, though it was a case most deliberately and solemnly adjudged, and decided without the least hesitation by the Court of King's Bench. That case was, in truth, a decision of the very question in the present one; the only difference being, that there the bankrupt, and here the solvent partner, gave an acceptance; and that there it was given for a debt of the bankrupt wholly unconnected with the partnership dealings, and here it was given for a partnership debt; differences which, as far as they go, most clearly render that a stronger case than this against the title of the holder. It is observable, also, that the Court of King's Bench, in *Lacy v. Woolcott*, had the matter before it on a special case; the point had been raised at the trial, and the matter put into this shape, for the sake of a more solemn determination, and the Court had no doubt or hesitation on the subject, stopping the counsel who were to have argued on the other side. *Thompson v. Freere* (a), was cited, as well as *Ramsbottom v. Lewis* (b), and the answer given by the Court proceeded exactly on the distinction which I have here stated. The decision in *Lacy v. Woolcott* has never been questioned; but, as I understand, has been acted upon at Nisi Prius, and is certainly referred to as a recognized authority in a later case in the

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(a) 10 East, 418.

(b) 1 Camp. 278.

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Common Pleas,—I mean *Craven v. Edmondson* (a). So that the distinction which I have taken reconciles the authority of the *Nisi Prius* cases of *Ramsbottom v. Lewis*, and *Abel v. Sutton* (b); for in each of these the question was touching the effect of the solvent partner's act in transferring the partnership property, that is, the interest of the firm in bills of exchange, after the bankruptcy of one partner. Next to *Lacy v. Woolcott*, *Harvey v. Crickett* (c) is the most important case in every respect on the present question; for, although the point which arises here was not expressly decided there, yet the principle of that case plainly governs this, and, indeed, goes beyond the question on which the present judgment rests; and the doctrine stated by the learned judges, who gave the subject much consideration, is altogether applicable to the question before us. The difference, and the only one, is this:—here the solvent partner assumes to bind the firm by an acceptance in the partnership name given to a creditor of the firm (d); there, the solvent partner indorsed in his own name, to a partnership creditor, a bill drawn by a debtor to the firm, and made payable to the solvent partner; but the bill was drawn after the bankruptcy of the other partner, and was for a debt due to the partnership, and it was made payable to the solvent partner purposely, and upon the supposition that after the failure of the other, every thing devolved to the

(a) 6 Bing. 737.

(b) 3 Esp. 108.

(c) 5 M. & S. 342.

(d) The acceptances, however, in this case were given by the solvent partner, not only after the act of bankruptcy committed by his copartner, of which the partnership creditor was perfectly cognizant,—but also, (as appears from the statement in the special case,) in contemplation of the bankruptcy of the solvent partner himself; for *Watts* delivered the acceptances to *Davies* on the 5th January, and then committed an act of bankruptcy himself on the 6th January.

one that remained. The case was therefore treated as one of a solvent partner disposing of partnership property, not assuming to bind the firm; but I see no distinction in principle between the two cases, where the solvent partner only assumes to bind the firm for a debt before existing, and where he gives a negotiable security for an antecedent liability of the firm contracted before the act of bankruptcy. The observations of *Bayley, J.*, that if the power of the solvent partner ceased on the bankruptcy of another, the house must close at once, and that the rights of the bankrupt passing to his assignees does not prevent the remaining partner from applying partnership property in satisfaction of partnership debts,—and the observation of *Best, J.* that, if it did, the solvent partner might be ruined in the midst of plenty,—are clearly applicable to the present question.

Those observations, going beyond the point to which it is necessary to go, are not quite reconcileable with some of the other cases; but, on the decision of the case itself, it cannot be doubted that the Court held the acts of the solvent partner binding on the firm; for he was permitted to transfer by indorsement the *chose in action* which was part of the partnership credits, and to bind, not merely his own undivided moiety, but also the moiety belonging to the bankrupt partner, that is, belonging to that partner's assignees. Had he indorsed the name of the firm, and had the bill not been paid by the drawer and acceptor, could the same Court, which decided in favour of his right to transfer the security, have denied that the holder of the bill had a right to go against the firm? Yet that would have been precisely the present case. Then what is the difference between holding that a solvent

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partner can pay a partnership debt, by transferring the credits of the firm,—and holding that he can pay the same debt, by giving a security which entitles the creditor, or his transferee, to go against that partnership, and it may be the credits of the firm? It must however be observed, that if, as is generally supposed, and as the argument of the learned judges, particularly of *Bayley J.*, entitles us to believe, that *Harvey v. Crickett* (a) went the length I have been assuming, it goes a great deal further than is necessary to support the view I take of the present question; for, although the solvent partner had only the power of binding his own share of the actual partnership property, yet he might still, on the principle of that case, and on the general ground already stated, have the power of binding the firm by acceptances for partnership liabilities given to a holder without notice of the bankruptcy (b). *Harvey v. Crickett*, in the full extent to which it goes, is not perhaps quite reconcileable with some earlier cases, particularly those at Nisi Prius (to which I have already referred) of *Abel v. Sutton* (c), and *Ramsbottom v. Lewis* (d); but its principle has not since been shaken; and I do not see how, on this principle, the decision of *Lacy v. Woolcott* (e) could stand, if the judgment of the Court of Review in this case be right.

On the whole, whether I regard the general principles which regulate the law of partnership, or bankruptcy, or the authority of the decided cases when narrowly examined, I have no more doubt how the law on this question at present stands, than I should have upon principle of the highest expediency, how

(a) *Suprà.*(c) *Suprà.*(e) *Suprà.*

(b) See note (a) ante, p. 391.

(d) *Suprà.*

the law ought to be, if we were now at liberty to enter upon such an inquiry. The decision I have come to is, therefore, that the petitioner has a right to prove, and that the Court of Review ought not to have expunged his proof.

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This only determines that the solvent partner can bind the firm by accepting a bill in the name of the firm, and passing it to a holder ignorant of his copartner's bankruptcy (*a*), and has no bearing on the power of that partner to transfer the partnership property. The Court is not called on to deal with that question, in deciding that a *bonâ fide* holder of such an acceptance, ignorant of the bankruptcy of the other partner, has a right to prove against the joint estate of both the partners.

As this is a question of very great importance,—and as there is some conflict even in the language of some of the learned judges in the cases that have been referred to,—and as the question appears not to have been so fully considered by the Court below, as its importance appears to me to demand,—I thought it right to consult some of the learned judges of the highest authority, and particularly those who sat on the decision of some of the former cases at law; and they entertain just as little doubt on the question, as I do.

Order reversed (*b*).

(*a*) There appears to be some little confusion here between the *first*, and the *second*, holder of the bills in question, that is, between *Davies*, to whom the acceptances were given by *Watts*, the solvent partner,—and *Robinson*, to whom they were afterwards passed by *Davies*. *Robinson* was, no doubt, ignorant of the bankruptcy of *Watts's* partner, *Houghton*; but *Davies*, when he took the bills, well knew that fact.

(*b*) And see *Woodbridge v. Swann*, 4 B. & Adol. 633.

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Westminster,
November 6 & 7,
1833; and
January 31,
and
February 20,
1834.

After a proof by A. as the holder of a bill of exchange, B. pays it for the honour of the drawer, which is unknown to the assignees until after several dividends had been paid by them to A.'s representatives.

Upon a petition by the assignees to expunge the proof and refund the dividends, *Held*, that the drawer of the bill, or B., who paid it for his honour, ought to have been served with the petition, notwithstanding the assignees (it did not appear how) had obtained the possession of the bill.

Quære, whether, if they had been served, a petition in bankruptcy was the proper remedy, to compel the repayment of the dividends.

The time for presenting a petition for a re-hearing in bankruptcy is not limited to six months, nor need such petition state the grounds of the application.

Ex parte GREENWOOD.—In the matter of BAILLIE.

THIS was a petition for a re-hearing, and for the reversal of the order made by the Court on the former hearing, which was to expunge a proof and refund the dividends received upon it. The original petition was heard on the 2d June 1832, when the facts of the case were fully gone into, and are stated in the former report (a),—with the exception, that instead of the bill of exchange being drawn at two months date, as is there mentioned, it was drawn at forty-two months date.

Mr. *Montagu*, and Mr. *Quin*, appeared in support of the petition.

Mr. *Swanston*, and Mr. *Richards*, for the assignees, by way of preliminary objection, contended, that after so long a time had elapsed, it was contrary to the rules of the Court to grant a re-hearing. It had been always considered, that a re-hearing could not be had after the expiration of six months from the date of the original order. The Court considered this rule to exist by what fell from the judges in *Ex parte White* (b), and his Honor the Chief Judge was there reported to acknowledge its existence (c). So also his Honor Sir *J. Cross* considered, that a petition for re-hearing filed after a lapse of six months was in contravention of an established rule. The order of 27th January 1726 (d), indeed, limits the time for re-hearing to within one

(a) See *Ex parte Boulton*, 1 Deac. & Ch. 556. (d) Beame's Ord. 339.

(b) 2 Dea. & Ch. 334.

(c) But see, as to this, the Table of Errata, 2 Dea. & Ch.

month after judgment has been pronounced. And in the Exchequer, in the case of *Bowyer v. Bright* (a), it was decided that a re-hearing will in no case be granted after six months from the decretal order. Such also was the general rule in Chancery and in bankruptcy (b).

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Another preliminary objection was, that the petition for re-hearing did not state the grounds upon which the application was made, *Gifford v. Hart* (c).

Mr. Montagu. Although a rule of this kind, as to limiting the time for re-hearing, might once have existed, it does not virtually exist at the present day. There are several cases mentioned in *Grant's Practice of Chancery* (d), where a re-hearing has been granted after a much longer space of time,—for instance, even after twenty years. That the rule mentioned by the other side is not now acted upon, the case of *Wood v. Griffith* (e) will plainly show. As to the other objection, in Chancery, it is admitted that it is necessary, in order to obtain a re-hearing, to present a petition stating the grounds; when an order is made upon that petition. But in bankruptcy, the petition for re-hearing, and the re-hearing itself, both come on together; wherefore it is not necessary in this instance to state the grounds for the re-hearing.

Mr. Swanston, and **Mr. Richards,** then desired that the petition might stand over, in order to give them an opportunity to look into the cases upon the subject; as they had considered it to be a settled rule, as well

(a) 13 Pri. 316.

(d) 1 Vol. p. 240.

(b) See also 1 Newl. 656.

(e) 1 Mer. 336.

(c) 1 Sch. & L. 398 ; 2 Mad. Chan. 483.

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of this Court, as of all others in equity, that there could be no re-hearing after six months, and they had not therefore duly considered the point.

ERSKINE, C. J.—The *second* objection, even if it is tenable, will avail but little ; since, if we were to refuse the re-hearing on that ground, the parties could at once appeal to the Lord Chancellor. But as time is desired, the case had better stand over till to-morrow.

November 7.

Mr. *Swanston*, and Mr. *Richards*, now stated to the Court, that they had looked into the cases, and were unable to adduce any further authorities upon the subject ; upon which,

The COURT said, that although there was a decided rule, and a case upon it, in the Exchequer, yet there did not appear to be any rule of the kind in Chancery. In *Ex parte Roffey* (a), Lord *Eldon* had expressed his regret that no rule of the sort existed ; but nothing has been since done to remedy the inconvenience. As to the second objection, the Court thought that the petition need not state the grounds for the re-hearing.

Sir JOHN CROSS.—I find it laid down in the books of Chancery practice, that such a rule has once existed, but that it is not strictly adhered to, it being discretionary in the Court to act upon it, or not. It seems to me, however, that if any such rule had ever been followed in Chancery, it is still more applicable in bankruptcy, when so many extensive commercial transactions

(a) 19 Ves. 468. And see *Ex parte Dewdney*, 15 Ves. 479 ; *Ex parte Baker*, Mont. & M. 279 ; *Ex parte Bolland*, id. 327 ; *Ex parte Tindal*, Mont. 379.

may depend on the final settlement of questions, which come daily before us.

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Mr. *Montagu*, and Mr. *Quin*, then proceeded to argue in support of the petition. The point relied on is, that there was no evidence before the Court on the former occasion as to the bill of exchange being an accommodation bill, nor of the circumstances under which it was delivered up to the assignees, nor to whom the bill, in point of fact, belonged. It might therefore belong to *Cox's* representatives, who would have a right to retain the proof upon the proceedings. [Sir *G. Rose*. The order made by the Court on the former occasion is defective upon the face of it, as it does not appear that the drawers of the bill appeared on the original hearing of the petition, or that they were in fact served with the petition. The Court could therefore not order the proof to be expunged, in their absence, as they were entitled to all the dividends upon the proof, after they paid the bill,—unless, indeed, it was accepted for their accommodation,—a circumstance which does not appear on the petition. But even then they would have been necessary parties before such an order could be made.] No person representing either the drawers of the bill, or *Cox*, who paid it for their honour, was before the Court on the former hearing, and therefore the Court could not, in the absence of the necessary party, expunge the proof.

ERSKINE, C. J.—When the proof was originally made, the party proving was the holder of the bill, and, as indorsee, he had of course a right to prove against the acceptor. Subsequently to this proof, however, it appears that the bill was taken up by *Cox* for the honour

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of the drawers, *Mackenzie & Co.* In that state of circumstances, the proof ought to stand for the benefit of the drawers, or for *Cox*, or his representatives, if any thing is still due from *Mackenzie & Co.* to him; and the only way in which that can be got rid of is, by showing the bill to have been drawn upon the bankrupts for the mere accommodation of *Mackenzie & Co.*, and that the bankrupts had no effects of *Mackenzie & Co.* in their hands. But even if that were proved, yet as the original petition does not state the fact of its being a mere accommodation bill, I do not see how we could expunge the proof.

As to the charge of fraud on the former occasion, that was not made out; but even if *Greenwood* knew that the bill was paid, still, if he did not know that it was mere accommodation paper, he had a right to continue to receive the dividends, although he ought to have considered himself a trustee for *Cox*, or his representatives.

Mr. *Swanston*, and Mr. *Richards*, *contrà*. This objection, such as it is, it should be remembered, was mooted on the former occasion, and abandoned by the counsel for the present petition. That ought to be an answer at once to this petition for a re-hearing. But even admitting the force of the objection, which presupposes an interest in the bill to exist in *Cox*, or his representatives, still as we have now possession of the bill, that possession is conclusive against the existence of any such interest. The bill came to the hands of the assignees as their property, and not in any way constituting them trustees for any other parties. If the bill were an accommodation bill, it seems to be ad-

mitted that the proof ought not to stand. But then it is said, that if it were not an accommodation bill, the drawer, or other party taking it up, would have a right to the benefit of the proof. But if it were not in his possession, how could he maintain any right upon it? Suppose no proof to have been made, could either the drawer, or the party taking it up, and not having the possession of it, now make any claim on the assignees? The holder of the bill alone has any right to make such claim, and the assignees have *now* all the rights of the holder. [*Erskine, C. J.* Do you mean to contend, that if any other party than the assignees were the holder of the bill, under the circumstances of this case, he could claim to have the proof expunged, as you did on the former petition? The mere holder of the bill would not have any right to make this application, for the Court would in that case have no jurisdiction. It does not appear for what purpose the bill was given up by *Cox*, who paid it for the honour of the drawers. But supposing it to be because he had no interest in it, it does not follow from that circumstance that the drawers had no interest in it; for they, after payment of the bill, became entitled to all the dividends on the proof.] Supposing, however, that any thing was ever due to *Cox's* representatives, is not the act of their delivering up the bill a release of all claim upon it? The assignees might indeed have taken an assignment of the bill. [*Sir G. Rose.* An assignment of it would not have placed them in a better situation. They might have had a right of action against *Greenwood*, but there would be no jurisdiction in this Court to compel him to refund the dividends. The assignees would have had no greater right, than a stranger taking an assignment of a

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debt.] But that does not affect the proposition we contend for, namely, that the delivery up of the bill to the assignees operates as a release of all right upon it. That circumstance undoubtedly affords a strong presumption of the absence of all right on the part of *Greenwood* to the receipt of any dividends on the bill, since it was returned from the hands of his testator *Parker*. The assignees have therefore a right to have the dividends repaid to them, which they paid in ignorance to *Greenwood*. For, as a creditor has a summary remedy against assignees to enforce the payment of a dividend, so they are in like manner entitled to the same summary process, to recover them back from a party who ought not to have received them. And as to the service of the petition upon the drawers, or upon *Cox*, who paid the bill for their honour, or upon their representatives,—it is not necessary, upon a question between the holder of a bill and a person who has received payment of it, that every person whose name appears upon the bill should be brought before the Court. Nor is there any probability that, after the lapse of twenty-five years, a claim would be made by any of the parties.

Mr. *Montagu*, in reply, was stopped by the Court.

ERSKINE, C. J.—This being an application to reverse a former order made after the deliberate judgment of the Court, it is advisable that we should take time to consider upon it, before we pronounce our final decision. It is much to be regretted, however, that the present objection was not pressed on our attention upon the former hearing. If my recollection serves me

correctly, it was then merely hinted at by the counsel, and was, in fact, abandoned, the respondents preferring on that occasion to rest entirely upon the beneficial effect of *Greenwood's* certificate, and of the statute of limitations. But as this is a petition for re-hearing, I think we are bound to consider the whole matter open to us, and to look at the case as though it were before us for the first time; we must therefore deal with the objection as if it had been pressed upon us on the former hearing, and see if it would be deserving of any weight in its primary bearing upon the merits of the case.

If the original petition had stated the bill to have been a mere accommodation bill, it would have been clear, after being taken up by *Cox* for the honour of *Mackenzie & Co.* the drawers, without effects in the hands of the bankrupts, that no claim could have been made against his estate; and the proof must, of course, in that case have been expunged. But then those facts ought to have been in evidence before us, besides an allegation to that effect in the petition. I do not say, that as much strictness is required in framing petitions, as in pleading in the other courts; for if the facts stated had merely led to the inference of the bill being an accommodation bill, I think it would have been quite sufficient. But then they must fairly lead us to such an inference; whereas nothing but an equivocal possession of the bill by the assignees appears to have been stated in the original petition. But the delivery of the bill to the assignees might have been with a claim of the dividends, or it might have been only giving up the right then existing in the bill; which would raise a very different question from that now before us. The fair inference deduced from the state-

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ment in the petition is, that the acceptance of the bill by the bankrupt was an ordinary mercantile transaction, and not for the accommodation of the drawers. The giving up the bill may certainly operate as a release as to future dividends; but it cannot give a right to compel the refunding of those already paid. I shall defer however expressing any final opinion upon the case at present.

Sir J. CROSS.—The first difficulty I have to surmount on the present occasion is, to agree that the Court is bound, *ex mero motu*, to take an objection of this nature, which the parties themselves have not thought proper to urge before us. Our former judgment was delivered nearly eighteen months ago, during all which time the respondents have lain by, and never dreamt of taking such an objection as this themselves. The objection, as I view it, is to the mere form of the petition; and I do not think that under the circumstances we ought now to entertain it. I cannot agree that any party interested in the bill is not brought forward; for I think that a party, having possession of a bill, is *primâ facie* vested with all the interest in it, and we ought not to indulge in speculative questions as to any probable interest in other parties. If *Greenwood* had actually paid back this money, pursuant to our former order, would it not have been a good defence to any party claiming it of him? Therefore, in the teeth of the presumption of no interest whatever continuing in *Cor*,—a presumption which arises from twenty-five years non-claim on his part,—I cannot think we shall be justified, at this period of time, in taking any steps to upset our former judgment.

Sir G. ROSE.—When this petition for re-hearing was presented, calling upon us to reverse a former order of this Court, it became a part of my judicial duty, in the first place, to see whether the order complained of was justified by the allegations in the former petition, on which that order was made. The bill had originally been rightfully proved against the bankrupt's estate; and the party proving it, who was the indorsee, afterwards received the full amount from *Cox*, for the honour of the drawers, the bankrupts being the acceptors. In that state of circumstances, what right can possibly accrue to the assignees? Certainly they cannot be entitled to expunge the proof; for the proof should properly remain on the proceedings, and we should regard *Greenwood* as the agent and trustee for *Cox* or his representatives, who took up the bill; yet all that appears upon the face of the original petition to warrant the order to expunge the proof, are merely those simple facts. Now these, in my humble judgment, are not sufficient for any such purpose. For it may possibly turn out, that although *Greenwood*, in the character of executor to *Parker*, may not be entitled to sustain the proof and receive the dividends, yet that *Cox*, having taken up the bill for the honour of *Mackenzie & Co.*, may, in the absence of any allegation or proof that the bill was a mere accommodation bill,—upon which therefore nothing would be due from the bankrupt,—have, as he certainly *prima facie* has, an interest in the proof; he may have acquired a right to repayment from the bankrupts' estate of what he paid for the honour of *Mackenzie & Co.*; and therefore, until the contrary is proved, the proof, I think, ought to be retained. In this Court, we have nothing to do with

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the receipt by *Greenwood*, who becomes a trustee for *Cox*, or his representatives; and therefore before we could properly make the order which is now complained of, we should have had *Cox*, or his representatives, before the Court.

If the bill had been obtained by the assignees during its currency, a different question would arise; but it was not so; and the mere handing over the bill, after it has been proved under the commission, will at no time give the legal right to the dividends on the proof, which any subsequent holder of the bill can only obtain, through the medium of the party by whom the proof was made.

But we are told, that the handing over of this bill is to have the effect of a release. Even granting that position, how could we be justified by the original petition and affidavits in declaring it to be so? But if it in fact amounts to a release, yet that would only give a right to a restitution of the dividends, either by a suit in equity, or by action at law. It would give no right to expunge the proof. Besides, a bare release could not give a right to recall payments made before the time when the release was given.

For these several reasons, I feel bound to say, that the order was defective and erroneous, and therefore ought to be reversed.

Westminster,
February 20,
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The case stood over for final judgment until this day, when the Judges delivered their opinions as follows.

Sir J. CROSS.—This case has stood over some time

for judgment, because I have had the misfortune to differ in opinion from my learned colleagues. The facts of the case need not be repeated by me, as they are already reported (a). The only point now in question arises on a petition for the rehearing of the matters of a former one, on which a final judgment has been pronounced, and an order made, near 18 months ago. In the course of the hearing of the new petition, one of the members of the Court, who was absent on the original hearing, suddenly interposed an objection to the validity of the order, as being void upon the face of it, for want of a necessary party. This came upon us all by surprise, and I was desirous we should take time to deliberate before we decided upon it.

The question is, whether the Court is bound of its own mere motion, to annul its former judgment, as void, for this alleged defect. The respondent, *Greenwood*, has all along admitted, that he has received dividends which he ought to refund, and has actually tendered back a part of them to the assignees; and the only questions in dispute between the parties, on the original hearing, related to the amount to be refunded. Nor has he now insisted upon the supposed *jus tertii*, as a ground of defence, or a ground for reversing the former order. Indeed, we have no evidence of its existence. For the party who exonerated the bankrupts' estate, by taking up the bill above 28 years ago, has never since advanced any claim to the dividends; and his representatives have lately delivered up the bill to the assignees.

The objection therefore appears to me, to be merely technical, and not at all tending to the furtherance of

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(a) 1 Dea. & Chit. 556.

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justice, but to the defeat of it; and I can find no principle, or rule of practice, that requires a spontaneous reversal of our former judgment. If the respondent, *Greenwood*, be entitled to take advantage of this objection, he might have availed himself of it on appeal long ago, without a petition for a re-hearing; and that course is still open to him, the objection being considered apparent on the face of the order. It is therefore with much regret, that I find myself unable to concur in reversing the order made so long ago, in a matter that has been depending nearly 30 years.

Sir G. ROSE.—In addition to the observations I made on this case when it was argued before us, it is only necessary for me now to add, that on petitions for re-hearing, like the present, the whole matter of the former petition is opened afresh, and the case comes before us, as though no order or decision had ever been pronounced. This practice is familiar to us all; and therefore it was, that I thought it right to interpose the objection of want of proper parties before the Court, to justify the order.

ERSKINE, C. J.—When this matter was first under discussion in this Court in 1832, the only defence suggested by the affidavits of the respondent, *Greenwood*, or urged by his counsel at the bar, was, the answer which was given to the application made by the assignees before the petition was presented, namely, that *Greenwood* had received the dividends in question, in ignorance of the fact that *Parker* had received payment of the bill in his life-time; and that as the five first dividends had been received without fraud, and more than six years before the application to refund, *Greenwood*

was entitled to avail himself of the legal defence afforded by the statute of limitations; and that the last dividend therefore, amounting to 3*s.* 3*d.*, was all that the assignees were entitled to, and that that sum had been tendered to them and refused; but that, if not protected to the full extent by the statute, he was at least entitled to retain the three first dividends received before the date of his own commission, under which he had obtained his certificate. In the course of the argument it was suggested to the counsel by me, whether *Greenwood* might not be considered as holding the dividends in trust for *Cox*, who had taken up the bill for the honour of one of the drawers; which was assented to at the time, and followed up by the remark, that in that view of the case *Cox* ought to have been served with the petition; but upon the representation by the counsel for the assignees, that the bill had been delivered up to them by the representatives of *Cox*, who was dead, and that it was then in their possession, the objection was not pressed, and the argument proceeded upon the merits; and upon the consideration of these alone the order was eventually made, which the present petitioner now seeks to rescind, or modify.

Upon the petition being opened on the re-hearing, the learned judge, who had been absent upon the former occasion, having suggested that the order to expunge the proof, having been made in the absence of the drawer, and of those who represented his interest in the bill, and without any proof of service upon them, could not be supported,—and the objection having been adopted by the counsel for the respondent,—it was thought desirable to have that question argued and decided in the first instance; because, if that ob-

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jection should prevail, it might become unnecessary again to discuss the effect of the certificate, and the statute of limitations. When the suggestion was made upon the hearing of the original petition, I thought it was answered by the facts of the case, from which (coupled with the possession of the bill by the assignees) I thought it might be fairly inferred, that the bill had been accepted for the accommodation of the drawers, and that they had no claim upon the estate of the acceptors, in right of *Parker's* proof; and as the objection was not pressed, both parties seeming desirous to have the petition decided on the merits, I considered the objection as to the service waived, and proceeded to form my judgment upon the questions raised by the parties, whose interests alone could be concluded by our decision. But when the objection was renewed upon the re-hearing, and pressed upon our attention, it became necessary to examine it more attentively; and for that purpose I thought it right to postpone our final judgment upon the point, until we could have an opportunity of deliberating and consulting upon the subject.

The way in which the difficulty presents itself to my mind is this.—The assignees demand the restitution of the dividends paid to *Greenwood* upon *Parker's* proof. If they assert their claim, merely in their character of assignees of the bankrupt, the acceptor, it is necessary, as a preliminary step, that they should expunge the proof of *Parker's* debt from the proceedings, and this they ask the Court to do. But if any other person has an interest in maintaining the proof upon the proceedings, the Court ought not to expunge it, without his consent. The first question to be asked, therefore,

is,—has any other person an interest in the proof? *Primâ facie*, the acceptor of a bill of exchange must be taken to have effects of the drawer in his hands; and therefore, if, upon the dishonour of the bill at maturity, the drawer take it up, he is entitled to recover the amount from the acceptor, if solvent,—or, if bankrupt, to prove it against his estate,—or, if it has already been proved by the indorsee, to stand in the place of the indorsee, and to receive the dividends upon his proof. And a person taking up a bill for the honour of the drawer stands in the same situation, *Ex parte Lambert* (a). In this case therefore, *Cox*, when he took up the bill in question in 1807, must *primâ facie* be considered as taking *Parker's* place, and as entitled to all the rights attached to his proof, in respect of the bill. But this *primâ facie* case may be rebutted, by proof that the bill was accepted by the bankrupts for the accommodation of the drawers, and that they had no effects of the drawers in their hands; in which case, though the acceptors would be liable to *Parker*, as an indorsee, for value,—the drawers, by taking up the bill, would derive no claim under *Parker's* proof; and *Cox*, of course, could have no better title than theirs.

The main question therefore, upon the branch of the case now under consideration, is, whether there is sufficient evidence to show that this was an acceptance for the accommodation of the drawers, and that the acceptors had no effects in their hands. The fact principally relied on by the assignees, namely, the delivery to them of the bill by the representatives of *Cox*, is not, I think, sufficient to raise any inference in their favour;

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unless all the circumstances, under which it came into their possession, were before the Court. It *may*, certainly, have been delivered up by *Cox*'s executors, because they knew that *Cox* had no claim in respect of it; but it *may* have been sent to the assignees, for the purpose of ascertaining whether he had any such claim, or not, or for some other purpose; and we are left without any clue to guide us by those, who had it in their power to give the fullest explanation.

There are, however, other circumstances in this case tending strongly to the conclusion, that the acceptors never received any value for this bill. At the time it was taken up by *Cox*, there was upon it the indorsement by the Commissioners, showing that it had been proved under *Baillie* and *Jaffray*'s commission. At that time a dividend to the amount of 94*l.* 12*s.* 11*d.* had been declared upon the proof. The commission was worked in London, the bill was taken up in London by a merchant, who must have well understood the rights of parties upon such instruments; and yet no claim was made by *Cox* for the dividend. The inference from these facts is, certainly, very strong, that *Cox* knew that the drawer had no claim upon the acceptors in respect of this bill, and, therefore, that he either never took the trouble to inquire whether any dividends had been declared, or, being aware of the fact, declined to claim them. But the case does not rest there; for although the bill has remained in the hands of *Cox*, or his personal representatives, for more than 20 years, he seems neither to have claimed the amount from the drawers, or the acceptors; for the vouchers, in the year 1831, came out of the hands of his personal representatives. These are, undoubtedly,

very striking facts; from which, if *Cox* were before the Court, and could give no satisfactory explanation of them, I should feel myself compelled to draw the conclusion, that the bill had been taken up by him, because the drawers were primarily liable, and that he had therefore no interest in *Parker's* proof against the bankrupt. But then there are circumstances to be placed in the opposite scale. The assignees must have had the means of ascertaining whether the bill was for value, or not; they must be taken to have known their right, if it was not for value, to recover against the drawers; they appear to have been ignorant, that the drawers, or any person for their honour, had taken up the bill; their forbearance, therefore, to seek reimbursement from the drawers, raises as strong an inference of their consciousness that the acceptance was for value, as the silence of *Cox* affords on the other side; and, as they are before the Court, they might have shown the fact that it was not for value; they might have shown the circumstances under which they obtained the bill from *Cox's* executors; and yet they leave us without any explanation. Are we then, in the absence of those who represent the drawers' interests, to raise an inference against them in favour of parties, who might have given further information, but have failed so to do? I think we ought not; because I do not feel myself at liberty to draw the same inference from the conduct of persons not before the Court, whom the party requiring me to draw the inference ought to have brought before us, that I should have done, if they had been called upon for an explanation, and had failed to give it; and still less, when the party, on whom the burthen of proof rests, fails to give all the explanation

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of which his case is susceptible. Neither do I think, that the mere possession of the bill by the assignees, unexplained, entitles us to consider them as representing the interests of the drawers, and to expunge the proof, as upon their consent. I am therefore of opinion, that we ought not upon this evidence, to expunge the proof; and, considering the direction to refund the dividends as merely consequential upon the direction to expunge the proof, the former order made upon the original petition must be rescinded, of course, but without costs.

The only remaining question is, what is to be done with the original petition? There are three ways of disposing of it; 1. by dismissing it, with costs; 2. by dismissing it, without costs; and 3. by allowing the assignees to amend, re-answer, and serve all parties,—reserving the question of costs, until the merits shall be ultimately decided. In looking at this part of the case, I cannot exclude from my view the fact that the respondent, *Greenwood*, has obtained possession (innocently, I will assume,) of a considerable sum of money to which he had no legal claim, and which he has not applied to the purposes to which, if rightly received, it ought to have been appropriated, and that a great portion of this money he may successfully refuse to refund. Neither can I overlook the circumstance, that the ground, upon which the case is now disposed of, was not set up by him as a ground of defence in the first instance,—in which case the Court might have allowed the petition to stand over, till the proper parties were before the Court,—but that the assignees may have been misled into the belief, that the grounds relied on in the respondent's affidavit were the only questions to

be agitated in argument. I think, however, that it is too late now to amend; and on full consideration of all the circumstances of the case, I am of opinion, that the original petition ought to be dismissed; but, for the reasons already alluded to, and in deference to the opinions of my colleagues, upon whose judgment, in concurrence with my own, the original order was made,—and especially in deference to the opinion already expressed by the learned judge on my right,—I think it ought to be dismissed without costs; of course, the dividends and costs ordered to be paid on the former occasion, if paid, must be refunded.

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Ex parte A * * * * *

Westminster,
November 20.

THIS was the petition of an attorney, praying that his admission to practise as an attorney of this Court might be inrolled as of the 12th January 1832. The affidavit, on which the application was founded, stated that the petitioner was duly admitted an attorney in the Court of King's Bench in Trinity term 1828. That on the morning of the 12th January 1832 (which was the first day this Court sat after it was constituted by the act of parliament) he attended for the purpose of being admitted a solicitor of the Court, and that he was then duly sworn among the first who were then in attendance before the Court. That the crowd being very great, he left the Court, without having heard the directions which he had since understood were then given by one of the officers of the

The admission of a solicitor, under peculiar circumstances, ordered to be inrolled *nunc pro tunc*.


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Court, that solicitors applying for admission should attend at the office in Basinghall Street to sign the roll of solicitors; the petitioner having only been told that the admissions would be made out, and might be obtained at Basinghall Street. Two or three days after he sent a clerk to Basinghall Street for his admission, who was told that the admissions had not yet been made out, owing to the great numbers applied for, but that the petitioner had done every thing necessary to become a solicitor of the Court, and that his admission might be sent for at any time. He neglected to make further inquiries, not thinking it of any importance. But on the 19th November 1833, he discovered that the requisites for his due admission had not been complied with, because the admission had not been inrolled. He, therefore, now prayed that the admission might be inrolled *nunc pro tunc*.

Mr. *Swanston* appeared in support of the petition.

The COURT granted the application, but without prejudice to the interests of any persons who had not notice of the application.



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Ex parte SOLARTE, and Others, Assignees of ALZEDO.

—In the matter of DYER and SWAYNE (a).

Basinghall
Street,
Subdivision
Court,
January 11.

THIS was a question as to the right of proof on certain cross bills accepted by the bankrupts, which had arisen before Mr. Commissioner *Merivale*, and had been referred by him to the Subdivision Court, consisting of himself and Commissioners *Fonblanque* and *Holroyd*. The circumstances of the case will be found fully stated in the judgment of the Court. It was argued by

A. and *B.* exchange their acceptances of various bills drawn upon them respectively by *C.*, and all three become bankrupt before any of the bills fall due. The acceptances of *A.* are negotiated by the drawer, *C.*, and are proved by the holders under each commission, who receive dividends on their respective proofs. *Held*, that *A.*'s assignees might prove the amount of *B.*'s acceptances under *B.*'s commission, subject to a retention of the dividends, until it was ascertained what each estate would pay on the whole of their liabilities.

Mr. *Montagu* in support of the proof, and by

Mr. *Ching* against it.

Mr. Commissioner **MERIVALE** delivered the judgment of the Court as follows. The case now before us is of a somewhat complicated nature, and involves points which, if untouched by express decision, might be considered as not unattended with difficulty. It is also a case of considerable commercial importance, and one which I therefore thought, on every account, deserving the application of that salutary provision of the

(a) Although not professing to report the decisions of the Subdivision Courts, which we think would be an unnecessary tax upon the patience of our readers, not because the judgments of the learned Commissioners are in any way deficient in legal knowledge or ability, but because they are not yet considered of such importance as to be cited as an authority in Courts of Justice, and we might therefore be accused of trying to swell out this work by a needless addition to the number of its pages; yet, as this case has already found its way into Messrs. *Montagu* and *Ayrton*'s Reports, we have also deemed it expedient, for reasons which will presently appear, to insert it in our present Number, having been obligingly favoured by our learned competitors with the short-hand writer's note of the judgment delivered on this occasion by the learned Commissioner.

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late Bankruptcy Court Act, by which the single Commissioner is enabled, in cases of disputed proof, to call, in the first instance, for the assistance of two of his brother Commissioners, in order to form a Subdivision Court, for the more solemn hearing and decision of the question. I might indeed have pursued a different course, and one which, if the case be ultimately at all events to come before a superior tribunal, might have saved the expense and delay occasioned by this intermediate proceedings. I might have pronounced my own decision on the question, according to the best of my individual judgment, and have left either party who might be dissatisfied with that decision, either to apply for a Subdivision Court, or to go immediately to the Court of Review, at his own option. But I felt that in so doing I should neither have been satisfied that I had performed my duty in the way which in every case of reasonable doubt or perplexity the law has prescribed, as that which it is incumbent on the single Commissioner to pursue, nor have been justified towards myself, in supposing that I should benefit the parties in the manner suggested; since this would be to imagine that one or the other party must necessarily be disposed to dispute the authority of our decision, and not only appeal from it, but also appeal from it with the certainty of the costs being to be borne either wholly or in part by the resisting party. It appears to me, on the contrary, that it is the duty of every regularly constituted tribunal to presume that its decision will be final; and, acting on that presumption, not to decide even in the first instance, except upon full deliberation, and with every assistance which the law has provided. I have said that this is a case which, if un-

touched by decision, might be considered as involving points of some doubt and difficulty; but if upon examination it should appear that the points have been settled by a train of judicial decisions, whatever doubt may still attach to the correctness of the principles upon which those decisions were founded, must give way before the far greater mischiefs which would result from disturbing the law which is settled, than any that can be supposed to attach to the decisions themselves.

Now, in order to a due understanding of the relative situation of the parties, and of their respective rights under this commission, it seems to me that little more is requisite than to keep steadily in view the following facts, namely, that there are three distinct and independent parties, and three distinct sets of acceptances, embraced in what may be called the history of the transaction. Thus we have, first, the house of *Knowles* and Son; secondly, that of *Dyer* and *Swayne*; thirdly, that of *Alzedo*; all which houses (having become bankrupt) are represented by their respective assignees; and we have, in like manner, the acceptances, first, of *Dyer* and *Swayne*, on bills drawn by *Knowles* and Son; secondly, of *Knowles* and Son, on bills drawn by *Dyer* and *Swayne*; and thirdly, of *Alzedo*, on bills drawn by *Knowles* and Son; which last set of acceptances were given by *Alzedo* in exchange for certain of the first-mentioned set of acceptances; viz. those of *Dyer* and *Swayne* on bills drawn by *Knowles* and Son; upon which bills the present proof is sought to be established. It should also be remembered, that all these several sets of bills were of such dates, as not to become due

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respectively until after the bankruptcy of each of the houses.

Now, as to the two first sets of acceptances, namely, those which passed between the houses of *Knowles* and Son, and *Dyer* and *Swayne*, it is abundantly clear, from the course of dealing between the two houses, that they were in the nature of mere reciprocal acceptances, given by the two houses for each other's accommodation, without specific exchange; and therefore, according to the principle established so long ago as the time of Lord *Roslyn* in *Ex parte Walker* (a), and ever since followed, not constituting a debt provable on either side under the bankruptcy. But, although mere accommodation bills, and as such not provable on their respective estates, it is equally clear, upon the principles no less firmly established and every day acted upon, that in the hands of *bonâ fide* holders for valuable consideration, and whether with or without notice of the nature of the dealings between the two houses, they constitute such a debt as would be held provable upon both estates under the respective commissions.

Now, this being the state of the case as between *Knowles* and Son, and *Dyer* and *Swayne*, in respect of their mutual acceptances, it appears that some of the bills drawn by *Knowles* and Son, and accepted by *Dyer* and *Swayne*, are delivered into the hands of *Alzedo*, in exchange for his (*Alzedo's*) acceptances on bills drawn by *Knowles* and Son to the like amount, which acceptances of *Alzedo* have since been negotiated by *Knowles* and Son for value received by them, and have been proved by the holders under each commission; the estate of *Knowles* and Son having paid 5s. 6d., and that

(a) 4 Ves. 372.

of *Alzedo* 10s. 10d., in the pound upon those acceptances. And it is upon the acceptances of *Dyer* and *Swayne*, so given in exchange for *Alzedo*'s, and which were in the hands of *Alzedo*, and remaining unpaid at the time of the respective bankruptcies, that the assignees of *Alzedo* seek to prove against the estate of *Dyer* and *Swayne*, the acceptors; their right to be admitted to prove depending on the single question, whether, under the circumstances above stated, the acceptances given by *Alzedo* in exchange for those bills was a good and sufficient valuable consideration. Now, it is a principle quite as clearly established as either of those already noticed, that if a bill of exchange be given expressly in consideration of another bill, and in exchange for it, which is the case as to the present transaction, the consideration is valid; and the holders may prove under a commission against the party by whom the bill was given. It is almost superfluous to refer to authorities in support of a doctrine so fully recognized and established, and of which those of *Cowley v. Dunlop* (a), and *Buckler v. Buttivant* (b), have been cited in argument. They may be all found collected, among other treatises of deserved celebrity, in a portion of the very valuable work of Mr. Baron *Bayley* on the Law of Bills of Exchange and Promissory Notes, commencing page 423 and ending page 430 of the fifth (which is the latest) edition; and we feel that it would be an idle waste of time, and imply a doubt where none can now exist, if we were on this occasion to proceed to analyse them, or inquire into the principles upon which they were originally founded.

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(a) 7 T. R. 565.

(b) 3 East, 72.

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It is not, indeed, attempted in argument on the part of the assignees of *Dyer* and *Swayne*, to dispute the doctrine thus broadly stated; but it is contended, that in the present case the bankruptcy of the parties having intervened before the falling due of the acceptances, makes a distinction, and that in such a case there is no debt provable, because no money had actually passed out of the hands of the acceptor of the counter-securities at the time of his bankruptcy. This, however, is a position which we apprehend cannot be supported, consistently with the doctrine that those counter-securities, by raising the liability to pay, do of themselves constitute a good valuable consideration,—nor consistently with the fact that they have been actually negotiated for value; and thus the benefit of them actually enjoyed by those to whom they were given in exchange for *Dyer* and *Swayne's* acceptances. According to the case of *Rolfe v. Caslon* (a), mutual acceptances are held to constitute not only a debt, but a debt provable under a commission, although no money has passed between the exchanging parties; and the former practice in bankruptcy (as is clearly explained by Baron *Bayley* in his *Treatise*) was, in strict conformity with this doctrine, to admit such proof against the acceptor, although the drawer had not taken up his own acceptances; the only distinction being, (which appears to have been introduced by Lord *Thurlow* in *Ex parte Clanricarde* (b),)—except as varied, under the special circumstances of the dealing of a banker, by Lord *Eldon* in *Ex parte Blaxem* (c),—that a party who has actually advanced money, or the

(a) 2 H. B. 574.

(c) 8 Ves. 351.

(b) C. B. L. 160.

value of money, is entitled to prove and receive a dividend immediately; while one, who has only given bill in exchange for bill, though he may be admitted to prove, will not be entitled to receive dividends until he has either taken up his own acceptances, or until the account has been finally settled. The case of *Ex parte Bloram* is also an authority, that the law is the same, whether the consideration be the acceptance of the person to whom the bill has been transferred, or that of any other person; nor are these cases, so distinguished as to the actual receipt of the dividends being restrained until the taking up of the acceptances, in any respect at variance with the doctrine of *Sarratt v. Austin* (a) referred to in the argument—namely, that the money payable upon a counter-acceptance will not be a good petitioning creditor's debt to support a commission, unless it appear that the petitioning creditor has taken up his own acceptances,—for the same reason that a debt, (as is observed by *Mansfield*, C. J.) in its nature contingent, is not such a debt as would support a commission; for, his lordship adds, “it would be a singular construction of the statutes, that a man who will not be entitled to receive a shilling out of the bankrupt's estate, unless he take up his own acceptances, should be able to petition for a commission.” But, that this reasoning was held by his lordship as wholly inapplicable to the mere right to prove, retaining the dividends, is manifest from what he is represented to have said in the same case, as to the right to prove where there are cross-acceptances—a right which, at law, would be quite unquestionable, although in equity has been restrained under different circumstances in

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(a) 4 Taunt. 200.

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the different modes already mentioned. Then with regard to what has been contended in argument, that the present case is virtually governed by that of *Ex parte Solarte, In the matter of Knowles (a)*, where the Court of Review recently decided that the very acceptances upon which it is now sought to prove against the estate of the acceptors, were not provable, in the hands of the same holders, against the estate of the drawers, we conceive that the two cases are clearly distinguishable, upon grounds, which, though not marked with sufficient precision in the printed report, may be collected from the facts of the case, even as there stated; and that the distinction thus furnished, was also that taken by the Court, may be found by comparing the short-hand writer's note (which we have seen) of what was really said by His Honor Sir G. Rose, who appears to have pronounced an elaborate judgment, the principal points of which are either unnoticed, or most imperfectly hinted at, in the short printed compendium. By this note of the short-hand writer it appears, that the way in which his Honor put the case was as follows: "Admitting that *Alzedo*, (putting bankruptcy out of the question,) would have had good cause of action against *Knowles* and Son, they, *Knowles* and Son, on the other side, might have obtained an injunction in restraint of such action, upon a bill representing that there was no other consideration for *their* acceptances but *Alzedo's* unpaid and outstanding acceptances,—and that he (*Alzedo*) not being in a state to provide for those acceptances, they (the *Knowles's*) would have had to take up both their own and *Alzedo's* accept-

(a) 2 Deac. & Chit. 261.

ances; and were *Alzedo* to allege as a ground for dissolving the injunction, that he (*Alzedo*) had paid a dividend of near 12s. in the pound on his own acceptances, this would give him no right, as against the *Knowles's*, unless he could either deliver up the bills to the *Knowles's*, or otherwise relieve them from all liability in respect of those bills. Now here, in point of fact also, the estate of *Knowles* and Son has actually sustained the burthen of proof, and paid dividends to the amount of 5s. and upwards, on *Alzedo's* acceptances; whence it follows, that if *Alzedo* were admitted also to prove in respect of *Dyer* and *Swayne's* acceptances, which were taken by him in exchange for his own, there would be a double proof under the same liability;"—a mode of reasoning which, while it strictly applies to the situation of *Knowles* and Son, the drawers, has no application whatever to that of *Dyer* and *Swayne*, the acceptors of the bills now sought to be proved against the estate of the latter. Now this, though very obscurely intimated in the printed report, appears to be the true ground upon which the decision in *Ex parte Solarte* rested, and renders it unnecessary that we should look further into the report of that case, except for the sake of pointing out another inaccuracy, which is such as to render the report of no authority whatever, with respect to the grounds upon which the case was decided. As where Sir *G. Rose* is made to say, generally and without qualification, that bills, which would not constitute a good petitioning creditor's debt (*a*), cannot be provable under a commission;

(*a*) The chief inducement for reporting at such length this judgment of the learned Commissioner is, to defend ourselves against his severe remarks on the report of the case of *Ex parte Solarte*, occurring in the 2d vol. of these Reports, which, for some cause or other, he really seems to us to have gone a little out of his way to attack; since that case, as he himself admits, is

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a proposition, which thus broadly stated is not only untrue in itself, but is again at variance with the note clearly distinguishable from the present,—a distinction, too, which he adds “ may be collected from the facts of the case even as there stated.” Now, in order to avert from us the charge of leaving any thing “ unnoticed or imperfectly hinted at” in our report of the present case, we have thought it best to give, from the very *short-hand writer’s notes*, every word that was uttered by the learned Commissioner ; so that at any rate he cannot complain, on this occasion, that we have failed in our endeavours to report his own judgment accurately. It is imputed to us by the learned Commissioner, that we have made his Honor Sir Geo. Rose say, “ *generally and without qualification*, that bills, which would not constitute a good petitioning creditor’s debt, cannot be provable under a commission ; a proposition which, (the learned Commissioner is quite right in adding) thus broadly stated, is not only untrue in itself, but (very probably also) at variance with the note of the short-hand writer,” inasmuch as it is decidedly at variance with our own report of the case in question. The entire passage of Sir G. Rose’s judgment, as given in our report, is as follows :—“ Another test is, would *these five bills* form a good petitioning creditor’s debt ? It is clear *they* could not, as no consideration was in fact given for *them*. And if *they* would not constitute a good petitioning creditor’s debt, so neither are *they* provable under a commission.” Now, it appears to us, that it is rather too severe a piece of criticism to build on these words the accusation of our making Sir G. Rose say, *generally and without qualification*, that all bills whatever which do not constitute a good petitioning creditor’s debt, cannot be provable under a commission. His Honor is talking of “ *these five bills*,”—the particular bills which were sought to be proved in that particular case ; and there is no doctrine whatever laid down by him as applicable to bills *in general*. This *qualified* construction, too, of his Honor’s judgment appears to strike even the minds of our learned competitors, in their own report of the above case ; for, with the candour of a generous rival, they here subjoin the following *quære* : “ Does not the preceding sentence of Sir G. Rose’s judgment confine his observations to the *particular* bills in question ? *Vide* 1 Mont. & A. 275. That we have not given the identical words, nor probably half the words, that were used by his Honor in pronouncing his judgment, we are very ready to admit ; for the great rapidity with which that learned judge delivers, in no very audible tone of voice, the quick perceptions of his own mind, must cause even the swiftest short-hand writer to be occasionally at fault ; and we, to our great discomfort, be it known, are unskilled in the science of stenography. If the learned Commissioner, however, who we believe has some experience as a reporter, will try *his* hand, whether short or long, some leisure day, on a judgment of Sir G. Rose, the difficulty of his task might perhaps engender a feeling somewhat less hypercritical, in dissecting the sentences of a judgment, when the judgment itself is substantially correct.

of the short-hand writer, by which, what his Honor actually said, appears to have been as follows: "It is certainly a general rule, scarcely with more than one exception, that (in matters of *legal debt*) *provable debt*, and *petitioning creditor's debt*, are convertible terms,"—to which, he adds, that "if the debt will not do as a petitioning creditor's debt, it will not (*if a legal debt*) (a) do as a debt to be proved;" a most important qualification altogether overlooked by the reporters; and which point lets in the distinction of *Sarratt v. Austin*, that a debt of this nature, although strictly provable, is not a debt which will support a commission. So also, when it is stated as a ground of their Honors' decisions, in the same case, in admitting the proof in respect of two bills, (distinct from either of those now in question,) "that although no notice of dishonour was given, yet as they fell due after the bankruptcy of Messrs. *Knowles*, no notice was requisite;" it is impossible to doubt that this statement must also have arisen from some inadvertence on the part of the reporters (b);

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(a) It is difficult to comprehend the distinction here drawn between *legal debt*, and *equitable debt*. The debt in *Sarratt v. Austin* was in its nature a *contingent debt*, which was not the less a *legal debt*, because it was *contingent*; and yet the debt in that case was strictly provable, although it was not a good petitioning creditor's debt.

(b) With respect to this passage in the Report, which is taken from the judgment of his Honor the Chief Judge, we are bound to believe,—from the way in which his Honor has expressed himself in the subsequent case of *Ex parte Johnson*, *post*, 433, where this point came directly before the Court,—that we have here been guilty of some inadvertence. But for the purpose of mitigation, not of justification of the error, we are quite sure that his Honor will forgive us for saying, that we were not the only persons who mistook his meaning on that occasion; and although we feel it incumbent on us to acknowledge, that we must either have caught inaccurately what fell from him in pronouncing his judgment, or have mistaken the drift of his observations, yet it might have so happened,—as indeed his Honor has himself admitted in the subsequent case of *Ex parte Johnson*,—"that in hast-

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being, thus broadly taken, at variance with the law as established in *Rohde v. Proctor* (a), and ever since

enning over that part of the case, which had not been much dwelt upon, to the consideration of those points which had formed the main subject of discussion, he was probably less explicit than he ought to have been." For the ground upon which the proof on the *two* bills was admitted in *Ex parte Solarte*, we refer to the statement of the Chief Judge in the course of the argument in the case already referred to, of *Ex parte Johnson*.

Our readers are probably aware that a judgment, pronounced *instantly* after a case has been argued, is frequently less perfect in its delivery by the judge, and always less perfectly given to the public by a reporter, than one which the judge has taken some time to consider. Such is the predicament in which we at present stand; and we are fully sensible, that any recrimination on our part can form no justification of an inaccuracy that we ourselves have unfortunately committed. But, as the example has been set us by the learned Commissioner, of going out of the way to point out errors, might we not here retort, in his own language, and in his own spirit of criticism, that he has himself, in his comments on the case of *Rohde v. Proctor*, been guilty of the same inadvertence he ascribes to us? For the learned Commissioner has stated "*generally and without qualification*," that it was established by that case, "that although a party entitled to notice have become bankrupt, that does not dispense with the necessity of notice, either to the bankrupt himself, or to his assignees, *if assignees have been chosen*;" when, if our readers will take the trouble to refer to the report of that case in the 4th vol. of *Barnewall & Cresswell's Reports*, page 524, it will be found, that Mr. Justice *Bayley*, who delivered the judgment of the Court on that occasion, expressly says, "whether this (that is, the necessity of notice to the bankrupt, or his assignees) be universally and in all cases true, it is not now necessary to decide; all that the present case requires is this, that *where the bankrupt's house continues open, and an agent of the assignees there*, notice is essential, and a neglect to give it, a bar to the holder's claim against the bankrupt's estate." And when the same case, also, came afterwards before Lord Chancellor *Lyndhurst* (Mont. & M. 430) on a petition for re-hearing, his Lordship admitted that "it was a *particular and special* case, and that it would have been travelling out of the way to decide the general point;" and he stated the purport of a communication made to him on the subject by Lord *Tenterden* in these words: "The safest rule, and most conformable to the law merchant, is to require notice, *where the house of the drawer is open, and his assignees known*, and this notwithstanding his bankruptcy." So that it appears, from the Reports of this case, both in *Barnewall & Cresswell*, and *Montagu & Macarthur*, that it was *not* established universally, as asserted by the learned Commissioner, that bankruptcy "does not dispense with the necessity of notice, either to the bankrupt himself, or to his assignees, *if assignees have been chosen*,"—

(a) 4 B. & C. 517.

acted upon, that although a party entitled to notice have become bankrupt, that does not dispense with the necessity of notice, either to the bankrupt himself, or to his assignees, if assignees have been chosen (a). But this is an error which, as it does not affect the present question, we should not here have adverted to, except for the purpose of showing how little reliance is to be placed on this case of *Ex parte Solarte*, thus loosely reported, as an authority, even if it were at variance (but which it is not) with the principles upon which we conceive that the present case must be decided.

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A distinction has been attempted to be taken, as to the case of one of the bills now sought to be proved, viz. that for 293*l.* which was an acceptance of *Dyer* and *Swayne*, given to *Alzedo* in exchange for an acceptance of *Alzedo's* to the same amount, indorsed by *Dyer* and *Swayne*; upon which last acceptance Messrs. *Grote* and *Prescott* (the holders) have received dividends on all the other estates to the amount of 20*s.* in the pound; and it is contended, on the part of the assig-

but only in those special and particular cases, where the assignees are known or where the bankrupt's house continues open, and an agent of the assignees is in possession of it. "*Suus cuique attributus est error, sed non videmus id manticæ, quod in tergo est!*"

Whilst we are upon the subject of our former report of this case of *Ex parte Solarte*, it may be as well here to observe, in order to anticipate all further hypercriticism, that in the concluding sentence of the judgment of his Honor the Chief Judge, where he refers to the counter-acceptances, which were unpaid, being given as the consideration for the five bills, and says, "this is in fact no consideration,"—it must not be imagined, that these words are intended to imply that counter-acceptances, in general, form no valid consideration at law. It should more properly, perhaps, have been stated thus: However good a consideration these counter-acceptances might have been at law, yet, as a Court of Equity would have restrained the

(a) See observations in note, p. 430.

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nees of *Dyer* and *Swayne*, that as this bill has been proved against their estate, and they have paid dividends to *Grote* and *Prescott* on the amount of it, and as the bill is now in their possession, they are entitled to set it off against the cross-bill accepted by *Dyer* and *Swayne*, which is one of those now sought to be proved by the assignees of *Alzedo*. Upon the principle, however, by which we conceive that the present case ought to be regulated, and which is that of *Ex parte Clanricarde* (a), and the several cases which have followed in the train of that decision, it will not be necessary to make any special order respecting the bill for 293*l.*; the order which we think it right to make, under all the circumstances, being, that the assignees of *Alzedo* be admitted to prove upon all *Dyer* and *Swayne*'s acceptances in their hands, retaining the dividends for further directions, when it shall be ascertained what each estate (including that of *Knowles & Co.*) shall have paid on the whole of their liabilities. And in order to guard against any objection, on the ground of an indefinite suspension of payment, let it be understood, that all parties are to be at liberty to apply, whenever it shall seem probable that this account may be finally settled.

party giving them from recovering on those he received in exchange, so long as these given by him remained unpaid, these counter-acceptances therefore would, proceeding upon equitable principles, amount in fact to no consideration.

(a) C. B. L. 160 ; Bayley on Bills, 425.



Ex parte HUGH JOHNSON, for and on behalf of the
HIBERNIAN JOINT STOCK LOAN COMPANY.—In the
matter of JOSEPH WOOLFE COHEN (a).

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Southampton
Buildings,
June 11.

IN this case the petition stated, that the Hibernian Joint Stock Company lately caused a proof to be tendered before Mr. Commissioner *Evans*, the Commissioner acting in execution of the fiat, of the several bills of exchange thereafter described, upon which occasion the Commissioner directed that the opinion of the Court of Review should be taken upon the following

SPECIAL CASE.

In the year 1832, and for some time previously, the bankrupt *Joseph Woolfe Cohen* carried on the trade of a jeweller and factor at a certain house and shop situate at 14, Lower Ormond Quay, in the city of Dublin, and when in London, from time to time, he conducted the same trade in Bury Street, St. Mary Axe. The Hibernian Joint Stock Loan Company is a joint stock company, duly authorized by act of parliament to sue, and be sued, in the name of their secretary, and carrying on the business of bankers in Dublin.

The bankrupt had a discount account with this company; and upon the 24th January 1833 the company held various bills of exchange and promissory notes, all of which had been duly discounted by the company for account of the bankrupt, and had been duly indorsed and delivered by him to the company.

On the 24th January 1833 the bankrupt quitted Dublin, and came to London, leaving at that time his

(a) This case is reported in this place, on account of its bearing on some part of the case preceding.

The holder of a bill of exchange, falling due and being dishonoured after the bankruptcy of the drawer, is bound to use due diligence in giving notice to the bankrupt, or his assignees, of the dishonour of the bill. Therefore, where the bankrupt's house continued open in his absence after his bankruptcy, the messenger being in possession during part of the time, and the bankrupt's wife, or clerk, during the other period of his absence: *Held*, that the holder was, at least, bound to leave notice at the bankrupt's house.

Quære, whether he was bound also to seek out the bankrupt's assignees, for the purpose of giving them notice.

No such notice, however, is necessary, where there are no effects of the drawer in the hands of the acceptor, during the currency of the bill.

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house and shop in the care of his wife and clerk, who resided therein.

On the 6th February 1833 a fiat was awarded against the bankrupt, by the name and description of *Joseph Woolfe Cohen*, of Lower Ormond Quay, in the city of Dublin, and of Bury Street, St. Mary Axe, in the city of London, wholesale jeweller and factor, dealer and chapman, under which, on the 8th of the same month, he was duly declared a bankrupt; and the same was advertised in the *London Gazette* of that night, and *Patrick Johnson* was duly appointed the official assignee of his estate and effects.

The messenger under the fiat was sent to Dublin to take possession of the bankrupt's house, shop, and property, where he arrived upon the 11th February, and remained there until the 13th of March following, during which time he superintended the removal of the bankrupt's property from Dublin to London. The shop during that time continued closed, and no business was carried on upon the premises during the above period; but the house (to which the shop was attached) was open, and various messages and letters were received by the messenger relating to the bankrupt's affairs; and upon the messenger quitting possession of the premises, he left the same in the occupation of the wife of the bankrupt and his family. The *Hibernian Loan Company* had, however, no notice that the messenger was so in possession. Upon the 21st of February *John Naphali Hart*, of 5, King Street, Finsbury, in the county of Middlesex, watch-manufacturer; *Aaron Joseph*, of 8, George Street, Minories, in the city of London, merchant; and *Wm. King*, of Bridgwater Square, London, jeweller, were duly chosen and appointed

creditors' assignees of the estate and effects of the bankrupt. But the company had no notice that they had been so appointed assignees. The bankrupt did not return to Dublin until after the 12th of April 1833, when he passed his last examination under the fiat. All the bills of exchange and promissory notes so discounted by the Hibernian Loan Company were drawn by the bankrupt, and fell due after the bankruptcy. (They were particularly described in a schedule contained in the special case, and were twenty-nine in number.) Of these bills and notes, seven were drawn and made respectively for the accommodation of the bankrupt, and nine were accepted and made respectively for value. Of those accepted for value, one bill for 164*l.* 6*s.* 3*d.* fell due upon the 12th of February 1833, one for 100*l.* upon the 28th of February 1833, one for 18*l.* upon the 3d of March 1833, one for 197*l.* 13*s.* 1*d.* upon the 11th of March 1833, and the others fell due at various dates after the 13th of March 1833; among these were one for 77*l.* 10*s.* 6*d.*, one for 14*l.* 7*s.* 1*d.*, and another for 32*l.* 8*s.* 3*d.* Eight other bills and notes did not appear, either by the bankrupt's books, or by his balance sheet, to have been given for value; and the only evidence to prove that they were so given for value, was a letter from the bankrupt to the solicitor for the fiat, stating, that to the best of his knowledge he, the bankrupt, gave value for them. Of these last-mentioned bills, two fell due upon the 10th February 1833, one upon the 26th February 1833, one upon the 4th March 1833, one upon the 10th March 1833, and the others after the 13th March 1833. Two other bills were in the like predicament; one of these fell due upon the 6th February 1833, and the

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other upon the 16th March 1833. The Hibernian Joint Stock Loan Company tendered a proof for all these bills of exchange and notes; but as no evidence was adduced by the Company, that any notice of the dishonour of the bills or notes had been left at the bankrupt's house, or given to the assignees, or the solicitor to the fiat, the Commissioner refused to allow any one of the bills or notes to be proved,—the objection of the want of notice having been taken by the assignees and solicitor to the fiat; and he directed a special case to be stated for the opinion of the Court of Review, as to the following question, namely—

Whether all, or any, of the said bills of exchange and promissory notes were, under the circumstances stated, provable under the fiat.

The petition therefore prayed, that the Court would be pleased to take the special case into their consideration, and make such order thereupon, as should seem right, and the justice of the case might require.

Note.—The objection to the proof of the seven bills, which were drawn for the accommodation of the bankrupt, was waived by the counsel for the respondents.

Mr. *Lloyd* for the petitioners. Four of the nine bills which were accepted for value, namely, those for 164*l.* 6*s.* 3*d.*, for 100*l.*, for 18*l.*, and for 197*l.* 13*s.* 1*d.* fell due, whilst the messenger was in possession of the bankrupt's property under the fiat, that is to say, between the 11th February and the 13th March following. And as to these, we contend that no notice to the bankrupt of their dishonour was necessary. He was not then entitled to the possession of any part of his property; and it is clear, that he had no longer

any interest in the bills. As to the remainder of the nine bills accepted for value, they fell due, when there was no one representing the bankrupt in possession of his shop, or in the management of his business, and who was competent to receive notice. The holders of the bills, the present petitioners, were resident in Ireland, while the assignees (who were wholly unknown to the petitioners) were, in point of fact, resident in London. But, according to the case of *Ex parte Solarte* (a) decided by this Court, it appears that the bankruptcy of the drawer of the bill dispenses with the necessity of notice of dishonour.

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ERSKINE, C. J.—The expressions which I am there reported to have used, must not be relied on. I laid down no such general position, as is there stated. It is, however, due to the reporters to add, that in hastening over that part of the case, which had not been much dwelt upon, to the consideration of those points which had formed the main subject of discussion, I was probably less explicit than I ought to have been—and may therefore be responsible in some measure for the mistake. As to the two bills upon which the proof in that case was admitted, there was no evidence or admission that notice of dishonour had not been given; the objection rested upon the absence of affirmative proof, and we thought that as there was nothing to show that notice had not been given, and as no such objection had been taken before the Commissioner, or suggested by the respondent's affidavits, we were not called upon to assume the defect of notice, from the silence of the petitioner's affidavits,—and that as

Ex parte Solarte.
2 Deac. & Ch.
261, commented
on.

(a) 2 Deac. & Ch. 267.

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the bankruptcy of the drawer and acceptors, before the bills became due, reduced the objection to one of mere form, we ought not, as a Court of Equity sitting to administer the bankrupt's estate, to exclude the petitioners from that share, to which in equity and fairness they were entitled, upon such an objection so taken, and unsupported by evidence.

Sir *G. Rose* referred to the case of *Ex parte Moline (a)*.

Mr. *Lloyd*. In *Ex parte Moline* all that Lord *Eldon* decided was, that notice to the bankrupt before the choice of assignees was good and sufficient. His words are, "the bankrupt represents his estate till assignees are chosen. All that was requisite therefore was done, and the notice was quite sufficient." That case does not decide, in terms, that any notice was essentially requisite; therefore, *quoad* this case, it decides nothing. [*Erskine*, C. J. The inference to be drawn from the words used by Lord *Eldon* is, certainly, the other way; for it is plain, he thinks, that bankruptcy is not of itself a dispensation of the necessity of notice. If his lordship had not thought that some notice was requisite, he would hardly have felt himself bound to decide, whether the particular notice which was there given, was sufficient. There may be circumstances, undoubtedly, in which the want of notice will not form a valid objection; as, for instance, where the bankrupt absconds, or his shop is shut up, and no one left to answer any inquiries, and no assignees are chosen; in such cases, if notice cannot be given, it might not

(a) 19 Ves. 216; S. C. 1 Rose, 303; 2 Chit. jun. Bills, 871.

prejudice the holder's claim. In this case, however, the circumstances are different; and I think the cases of *Rohde v. Proctor* (a), and *Ex parte Rohde, re Rains* (b), must govern this.] Those cases, far from deciding the abstract question, that bankruptcy does not dispense with the necessity of notice, are particularly guarded and qualified; and it was only in the conjunction of the two facts, of the house continuing open, *and* of the assignees being known, that the judges came to the determination there mentioned. Where expressions, therefore, so expressly guarded are used by the judges in both those cases, it is not for this Court to presume or conclude, that if either of those facts had been wanting, the same judgment would have been pronounced. Here, the assignees were not known; the fiat was issued against the bankrupt as a trader in *London*; the assignees are proved to have lived in *London*; while the holders of the bills resided in *Dublin*. It is true, that the wife of the bankrupt continued to reside in the house at *Dublin*. But a wife has never been regarded as sufficiently an agent of the husband, to receive notice, and act in such a business as the present.

Then, again, with respect to the messenger's possession;—although Mr. Justice *Bayley*, in *Rohde v. Proctor*, says, that the messenger is partly an agent of the bankrupt, yet that is a very doubtful position; for the messenger is neither appointed by the assignees, nor by the bankrupt, but is a mere officer of the Court of Bankruptcy, whose duty is purely ministerial,

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(a) 4 Barn. & Cres. 517; 2 Chit. jun. Bills, 1269, S. C.

(b) Mont. & Mac. 430; 2 Chit. jun. Bills, 1452, S. C.

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and who is bound to seize and retain the property of the bankrupt, as against the bankrupt himself, or his assignees, until it be transferred by the Court, or by operation of law, into the custody of the assignees. The messenger was therefore not the party to receive notice. The bankrupt in this case had absconded, having left his place of business in *Dublin*, and it was unknown where he had gone to,—a fact, of which even his wife might have been kept in ignorance; consequently, no notice could have been given to him. Besides, how would the giving notice to him have varied the case? We are not to deal with what he might, if he had chosen, have done; but with what it was his duty to have done. And, as by the appointment of the official assignee, which is contemporaneous with the issuing of the fiat, all interest passed out of the bankrupt, the bankrupt was neither bound to give notice to the official assignee, nor to the creditors' assignees, when chosen. The present case, therefore, ought not to be governed by the cases of *Rohde v. Proctor* (a), or *Ex parte Rohde, re Rains* (a); because the facts here are different, and those cases are of no authority, except under directly parallel circumstances. For in the former case Mr. Justice *Bayley* says, "Whether this (*i. e.* that bankruptcy does not dispense with the necessity of notice) be universally and in all cases true, it is not now necessary to decide: all the present case requires is this, that where the bankrupt's house continues open, and an agent of the assignees there, notice is essential." And Lord *Lyndhurst*, for himself and Lord *Tenterden*, says in the latter case, "The Lord

(a) *Suprà.*

Chief Justice has besides informed me, that he entirely agrees with the judgment delivered by Mr. Justice *Bayley*, and he thinks the safest rule, and most conformable to the law merchant, is, to require notice where the house of the drawer is open, and his assignees known, and this notwithstanding his bankruptcy. It was, in fact, a particular and special case; the house was open, and the messenger in possession. I therefore agree in opinion with the Court of Law, that it was enough to decide the particular and special case, and that it would have been travelling out of the way to decide the general point." It would be dangerous to carry the doctrine contained in these two cases any further; especially, where the judges, in pronouncing their decisions, have so cautiously guarded against deciding on the general question, and have limited their observations to the particular circumstances then before them. [*Erskine*, C. J. The whole question really is, have you used due diligence towards giving notice? What is the degree of diligence required,—in the event of a failure, from necessity, to give notice in point of fact,—so as to invalidate the objection, must of course be an open question. In *Rohde v. Proctor*, Mr. Justice *Bayley* says, "when a bill is dishonoured, it is the duty of the holder to use due diligence to give notice to such of the parties to the bill, as would be entitled to a remedy over upon it, if they took it up; and the holder makes the bill his own, as against those parties, and loses his remedy upon the bill, by neglecting to use such diligence." That is a mere dictum of Mr. Justice *Bayley*; nor is there any other authority which requires, under a state of circumstances like these now before

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the Court, that any steps should be taken towards giving notice. Certain it is, that Lord *Thurlow* was of the decided opinion, “that the doctrine of notice, which holds amongst solvent persons, did not apply as between bankrupt estates(*a*);” and although Lord *Henley* in his book on Bankruptcy(*b*) says, that this has been repeatedly overruled, and that the contrary doctrine prevails, the cases cited in support of the observation, on being referred to, by no means bear it out; not one of them going to any thing like that extent.

As to the three bills for 77*l.* 10*s.* 6*d.*, 14*l.* 17*s.* 1*d.* and 32*l.* 8*s.* 3*d.*, they were made payable at the house of the bankrupt, and the inference is, that they were accommodation bills only; so that of *their* dishonour no notice whatever was requisite. In *Sharp v. Bailey* (*c*) it was held, that where the drawer of a bill of exchange made it payable at his own house, the jury might fairly infer that it was an accommodation bill; which made it unnecessary to give him notice of non-payment by the acceptor.

Mr. *Shee*, for the assignees, was stopped by the Court.

ERSKINE, C. J.—It having been admitted, that the seven bills set out in the second schedule were accommodation bills, and that no effects of the bankrupt were in the hands of the acceptor during their currency, all objection to them has very properly been waived;

(*a*) *Ex parte Smith*, 3 Bro. C. C. 3; 1 Chit. jun. Bills, 457, S. C.

(*b*) *Eden's Bankruptcy*, 140, 141, 2d ed.

(*c*) 9 B. & C. 44; 4 M. & R. 4; 2 Chit. jun. Bills, 1418, S. C.

and on those bills, therefore, the proof must be admitted.

The material questions raised are on the other bills; all of these fell due after the bankruptcy. Some fell due before the messenger came into possession of the bankrupt's property,—some while he was in possession,—some after he quitted the possession, and before the bankrupt's return,—and some after the bankrupt returned to his house. But all fell due while the bankrupt's wife and family were residing in the house, with whom notice of the dishonour might have been left.

I am not disposed to carry this case further than those of *Rohde v. Proctor* and *Ex parte Rohde (a)*; but, looking at the facts of this case, and comparing them with those of the cases referred to, I feel that we are bound to decide according to the doctrine there laid down, and to hold that these bills are not provable under the fiat. I take the general principle as laid down by Mr. Justice *Bayley*, in giving judgment in the case of *Rohde v. Proctor*.—"When a bill is dishonoured, it is the duty of the holder to use due diligence, to give notice to such of the parties to the bill, as would be entitled to a remedy over upon it if they took it up; and the holder makes the bill his own, as against those parties, and loses his remedy upon the bill against them, by neglecting to use such diligence." The principal question is, has such due diligence been used by the petitioners in this case? Amongst the parties entitled to a remedy over upon these bills, and therefore entitled to notice, were the respondents, the assignees of *Cohen*, the indorsee. What shall be considered sufficient notice to assignees,—and what cir-

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cumstances will excuse the holder in cases of bankruptcy, where the bankrupt has absconded, and his assignees are not known, are questions open upon each particular case. But even the case of *Ex parte Moline* (a),—which decides that as the bankrupt represents his estate till assignees are chosen, notice given to him was sufficient notice to the assignees,—shows, that, in Lord *Eklon*'s opinion, notice to the assignees in one way or the other was requisite. *Rohde v. Proctor* (b) also is founded on the very same principle. Now, although the bankrupt in this case is admitted not to have been residing at his house at Ormond Quay, during the whole of the respective times of the bills falling due, there is no evidence that he had absconded from it. It is stated, indeed, that he was in London during a part of the time; but it appears by the statement of the special case set out in the petition, that when in London from time to time, he conducted the same trade in Bury Street, St. Mary Axe, and that he might have been away from his house in Dublin, without any actual or apparent absconding, in the ordinary signification of that term. So long as the bankrupt was himself in possession of the premises at Ormond Quay, the case of *Ex parte Moline* shows that notice ought to have been given to him; and neither his absence, nor his bankruptcy, of which they were ignorant, could excuse the holders from adopting the ordinary course pursued where a bill has been dishonoured. The house was at all times open, the messenger being in possession of the premises during part of the time,—the clerk, or the wife, during the other period of the bankrupt's absence. In *Rohde v. Proctor* Mr. Justice

(a) *Suprà.*(b) *Suprà.*

Bayley says, "It is not necessary to decide in this case, whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to endeavour to find out his assignees; nor is it necessary to say, what would be the case, if such a party's house were shut up, and there were no means afforded there of discovering him, or his representatives; in this case the bankrupt's house continues open; the agent of his representatives, the messenger, who was also in some degree his representative, was there; notice there would have reached the assignees." There is no reason whatever, therefore, why some notice should not have been given in the present case.

But it is said, that the petitioners were not aware that the messenger *was in possession*. But it is manifest, that if they had adopted the usual course of leaving notice at the house, they would have discovered at once exactly how the case stood, or at least might have pleaded their ignorance of the bankruptcy, as an excuse for not doing more. It seems to me, that there has been in this case not only a want of due diligence, but a total absence of every ordinary precaution, on the part of the petitioners. If they had gone to the bankrupt's house and learned the fact of the bankruptcy, and contented themselves with leaving notice there, the question might have been raised, which is left in doubt by *Rohde v. Proctor*, viz. how far they were bound to seek out the bankrupt's assignees, and what further degree of diligence would have been required of them. But as the case now stands, I think we are bound to reject the proof of all the bills, except those to which the objection has been properly waived.

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With respect to three of the bills which were payable at the house of the bankrupt, and which are not stated by the special case to have been accepted for value,—it has been contended, that they must be taken to have been accommodation bills, notwithstanding on the face of the bills they purport to be drawn for value received. In the absence of all other circumstances, such a fact might fairly lead to the inference drawn by the jury in *Sharp v. Bailey* (a); but, as other bills similarly drawn are stated by the petition to have been accepted for value, and there are no other facts applicable to these bills leading to a different conclusion, we cannot, without further inquiry into the fact, admit their proof. An inquiry, however, might be directed to ascertain that fact, if the petitioners think it worth while to risk the expense of it. In the absence of that inquiry, the decision of the Commissioner must stand, with the exception of the seven bills admitted to be accommodation bills.

Sir JOHN CROSS.—I entirely concur in his Honor's observations. It is clear, that no such general rule at present prevails, as has been contended for by the petitioner's counsel, viz. that bankruptcy dispenses with the necessity for notice. In fact, the contrary principle is to be collected from all the cases on the subject. In the present instance, there is certainly a gross want of due diligence. If the petitioners had even taken the trouble to dictate any letter to the bankrupt, or his assignees, upon the subject of these bills, and had put it into any post-office, that might

(a) *Suprà*.

have been held to be sufficient. But here no step was taken by them to give notice to any person whatever.

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Sir G. ROSE also concurred.

It was ordered, that the proof of all the bills, except the seven accommodation bills, should be rejected; and each party was directed to bear their own costs, those of the respondents to come out of the bankrupt's estate.

Ex parte DAVIDSON.—In the matter of MABERLY.

Westminster,
June 11, 1833.

MR. MONTAGU applied, on motion, that the petitioner in this petition (a) might give security, or might pay into Court the sum of money which he had been declared entitled to, to abide the event of an appeal from the decision of this Court, in another case, which involved a similar question to that decided by the present case (b). The ground of the application was, that the petitioner, *Davidson*, was a suitor residing out of the jurisdiction of the Court.

The Court will not order a petitioner residing out of its jurisdiction, to give security for, or pay into Court, a sum of money which he had been declared entitled to by a previous order, merely because the respondent intends to appeal against the order, if there is no probability of a different decision on the appeal.

Mr. *Bethell*, and Mr. *Paynter*, on behalf of Mr. *Davidson*, opposed the application; and cited *Graham v. Campbell*, lately before the House of Lords, where it was determined that the mere pendency of an appeal gave no such right as that now sought for. In the

(a) See *ante*, 3 Dea. & Ch. 83 n. (a).

(b) It will be seen, that there were many cases alike in circumstances, so that one decision was taken as governing the rest. See *Ex parte Cunningham*, *ante*, 58; *Ex parte Solomons*, *ante*, 77; *Ex parte Wylie*, *ante*, 82; *Ex parte Belcher*, *ante*, 87.

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DAVIDSON. present case there was no fair subject for appeal, nor reasonable grounds for withholding the execution of the former order of the Court.

ERSKINE, C. J.—I can easily understand why we should suspend an order for payment, when a party, in whose favour it is made, is out of the jurisdiction, and there is a probability of a different decision being given on the appeal. But, in this case, there seems no prospect of such a state of circumstances being arrived at; and therefore, as the Court sees no reason, after very mature deliberation, to overrule the judgment already given in these cases (a), there is none why we should keep the petitioner out of his money, merely because the respondents are bold enough to venture on an appeal.

Sir J. CROSS.—This is an application to suspend our order, delivered in the shape of an unanimous judgment, because the respondent states his intention to appeal. This is never done at law, and I see no grounds in this case for laying down such a precedent in this Court.

Sir G. ROSE.—At law, a writ of error stays execution (b). So in many cases did an appeal in equity. But in Lord *Eldon's* time, the mischief arising out of such practice having become more and more apparent, the practice was altered; and the Court now never stops execution, unless reasonable grounds are shown to vary the decree below, and upon special

(a) See *ante*, n. (b).

(b) See 1 Chit. Arch. Pr. 338.

application (a). In the case of the *Amicable Society, In re Marsh*, in *Fauntleroy's* bankruptcy, there was the manifest danger of the money getting into the hands of the assignees, and being distributed, without the chance of its being again recovered; and therefore the order for payment in that case was stayed. But in the present case I see no ground for staying our former order, or for granting the other part of this application.

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Motion refused, with costs.

(a) By the XLVI. of Orders, 3d April 1828, it is directed, "that every application to stay proceedings upon any decree or order, which is appealed from, be made first to the judge who pronounced the decree or order," subject to which, and in accordance with it, is to be stated, that without a special order of the Court, a re-hearing, or appeal, does not stop any proceedings on the order or decree appealed from, and that a special application to stay proceedings pending on appeal failing, it is generally with costs; but the Court will sometimes, in permitting the successful party to prosecute the decree, reserve the consideration of costs. Newl. 364.

But in several instances the Court has suspended the decree, pending the appeal, either absolutely or upon terms. Ibid. 366.

Ex parte HALL.—In the matter of HALL.

Westminster,
November 23.

IN this case the bankrupt had applied for a supersedeas, upon the consent of all the creditors who had proved under the commission. One creditor, however, had died intestate and insolvent, to whom, therefore, no letters of administration had been taken out; but his son, who would have the right to administer, had signed the petition as a consenting party, and had made an affidavit stating, that he believed the debt

On a petition for a supersedeas with consent of creditors, where one of the creditors had died intestate; Held, that the bankrupt should either have taken out a limited administration, for the purpose of assenting to the supersedeas, or

(which would have been the better plan,) apply to the Court to expunge the proof.

1833. due from the bankrupt to his father to have been
 ——— satisfied. The Registrar, however, did not think
 Ex parte this a sufficient authority, and declined giving the
 HALL. usual order.

Mr. *Montagu* now moved, that the Registrar might be directed to give the necessary order.

The COURT thought they could make no order, as there was no person legally representing the deceased creditor before the Court. The petitioner might either procure a limited administration, for the purpose of assenting to the supersedeas; or,—which would be, perhaps, the better form of proceeding,—apply to this Court to expunge the proof.

No Order.

Ex parte WILLIAM KIRKMAN, residing in America, by
 GEORGE RYLE his brother in law, and JONATHAN
 HINE, R. N. TRAIN, and others, his creditors.—In
 the matter of the said WILLIAM KIRKMAN.

Southampton
 Buildings,
 Dec. 12, 13.

A trader, being in debt to several persons, leaves this country in June 1831 for America, with some intention of returning, but does not actually return, nor does he make provision for the payment of all his debts. In Sept. 1833, one of the creditors, whose debt was left unprovided for, issues a fiat against him, which the bankrupt, by his agent in this country, after the forty-second day, petitions to supersede. Held, (*dissent*. Sir J. Cross,) that the fiat could not be superseded, without the previous surrender of the bankrupt. Held also, *per tot. Cur.*, that the continued absence of the bankrupt, under these circumstances, amounted to an act of bankruptcy.

THIS was a petition to annul a fiat under the following circumstances:—The petitioner, until the year 1831, resided at New Basford, in the county of Nottingham; but in the early part of that year he, with his wife and son, went to America with the view of staying there for a short time, to see whether they should like to reside there; the petitioner intending, as he stated, to return to England again before

ing, as he stated, to return to England again before

finally taking up his abode there. The petitioner stated, that he was in a great measure influenced to pursue this project, by the fact of his son being in delicate health, and his desire to afford him the opportunity of a sea voyage, and a residence in another climate; but that his stay in America being uncertain, he did not before their departure give up the occupation of his house at New Basford, nor sell his furniture, but had it kept for his accommodation for a whole year, in case he should return to England. Before his departure he was indebted to different persons in 740*l.* 14*s.* 9*d.*, exclusive of 1300*l.* on mortgage; but he had property amounting to between 3000*l.* and 4000*l.*, which was more than sufficient to discharge his debts. Part of this consisted of an interest in a freehold estate at New Basford, subject to the mortgage for 1300*l.*, which was considerably less than its value; the annual rents, amounting to the sum of 180*l.*, being much more than sufficient to pay the interest upon the mortgage. Previous to the petitioner's departure, he discharged debts to the amount of 337*l.* 8*s.* 3*d.* and made provision for the payment of the remainder, amounting to 403*l.* 6*s.* 7½*d.*, by setting apart the rents of his freehold estate, after payment of the interest upon the mortgage. The petitioner stated, that long before he quitted England his intention to go to America had been the subject of general conversation in the neighbourhood of his residence, and of the residence of his creditors; and that when he left this country on the 27th June 1831, the knowledge of his departure was not intentionally withheld from any of his creditors, nor had there been the least intention on his part to delay them, or to dispose of his property

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to their prejudice. The petitioner having, as he alleged, sustained great inconvenience by sea sickness, and much injury to his health, did not return to England again, as he had intended.

The petitioner then stated, that all his creditors, whose debts still remained unliquidated, were well satisfied of his integrity, and had not yet required payment of their respective debts, and would not require the payment of them, until it should be convenient to him to discharge them. That in the year 1828, the petitioner had become a joint surety with *W. Roberts* for one *James Simpson*, by entering into two joint and several promissory notes, for the payment of the respective sums of 100*l.* and 90*l.* to one *Thomas Prichet*; the whole amount of the consideration for which notes was paid by *Prichet* to *Simpson*. That *Simpson* had prevailed on the petitioner, also, to become one of several sureties upon other promissory notes, for money advanced to *Simpson* by various money clubs; and that the petitioner, thinking that *Simpson* would be able to discharge these notes, omitted to inform *G. Ryle*, the agent he had authorized in England to liquidate his debts, that he was such surety for *Simpson*.

On the 27th September 1833 a fiat was issued against the petitioner by *Prichet*, under which the petitioner was declared a bankrupt, and the petitioners, *Jonathan Hine*, and *Robert Train*, and one *John Kiernan*, were chosen assignees. The petitioner then denied that there was any debt due from the petitioner to *Prichet* sufficient to support such fiat, for that fresh securities had been taken by *Prichet* for the 190*l.*, without the knowledge of the petitioner. The petitioner stated, that the debts which were

proved or claimed under the fiat (which amounted to 402*l.* 4*s.* 4*d.*) were, independently of the petitioning creditor's, nine in number; five of these debts amounting only to 144*l.*, and the remainder not being the debts of the petitioner, were claims upon *Simpson* in respect of the clubs upon the several promissory notes signed by the petitioner as one of his sureties, and in respect of which the petitioner did not receive any part whatever of the consideration money, nor had any knowledge whatever of the consideration given for such debts, nor whether the same were justly payable by *Simpson*, or by any of his sureties. That all the other creditors of the petitioner, who had proved or claimed any debts under the fiat, were parties to this petition, and consented to the annulling of the fiat; and the petitioner averred, that he was ready to pay to any other creditor to whom he was indebted the full amount of his claim. *Prichet*, the petitioning creditor, had tendered the proof of his debt; but the Commissioners refused to admit it. The petitioner, however, was ready to pay into Court, or to *Prichet*, the amount of it, namely, 202*l.* 2*s.* 5*d.*, together with the costs attendant upon the fiat, and also to pay to the other creditors their debts proved upon the notes signed by the petitioner as one of the sureties of *Simpson*, if the Court thought proper. The petitioner denied having committed any act of bankruptcy; and alleged, that the freehold estate at New Basford alone was worth at least 2500*l.*, which together with his property in America, and his other property in England, was more than adequate to the payment in full of every claim upon him, and would leave a considerable surplus.

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The petition therefore prayed that the fiat might be forthwith rescinded and annulled, at the costs of *Prichet*, the petitioning creditor.

Mr. *Montagu*, and Mr. *Bacon*, appeared in support of the petition.

Mr. *Bethell*, for the petitioning creditor, took a preliminary objection, that the petition was presented after the forty-second day had gone by. The bankrupt had never surrendered, and was now out of the jurisdiction of the Court, and the petitioner did not pray that the time for surrendering might be enlarged. The practice in such cases is very well known, and was fully established in this Court, in the case of *Ex parte Drake* (a), where it was deemed necessary that a bankrupt should surrender before his petition to supersede could be heard, even although the forty-second day had not expired. So in *Ex parte Crowther* (b) it was held, that if a bankrupt die without surrendering, his representatives could not be heard, except on a petition showing such a case, as would have induced the Court to allow the bankrupt to surrender, if living. Now here the bankrupt has not prayed for liberty to surrender. Another objection to this petition is, that it is presented by a party as an agent, who does not show any express authority for acting as such.

Mr. *Montagu*, and Mr. *Bacon*. It is not a universal rule, that a party cannot petition to supersede before surrender. This may be collected from the

(a) 2 Dea. & Ch. 91.

(b) Buck, 480; and see *Ex parte Gardiner*, id. 458.

case of *Ex parte Foulger, re Palmer* (a), which is still standing over for judgment. [*Erskine*, C. J. It may be said, however, to be almost a universal rule. In the case alluded to, our judgment is suspended by the peculiar circumstances of it; for there, there has been a verdict against the commission, and the petitioner seeking the supersedeas is not the bankrupt himself, but the petitioning creditor, whom we might reasonably suppose to be most desirous of supporting the fiat, if it ought justly to be kept on foot. But you are at liberty, if you can, to show that the rule is not settled.] Suppose there is in fact no sufficient petitioning creditor's debt, or suppose any other requisite,—as the act of bankruptcy, or the trading,—be wanting, can it be said, that though a man is not in any manner subject to the bankrupt laws, yet he must come in and submit himself to a proceeding altogether void and illegal, before he is at liberty to apply to set that proceeding aside? If the general rule is to prevail in such an instance as this, not only a monstrous absurdity, but gross injustice would be the effect; and the more so now, when there is no power of lodging a caveat (b), as was formerly the practice with respect to commissions, to prevent the fiat from being issued or sealed. There are many cases in which the Court has superseded before the forty-second day; thus, if any fraud, or want of good faith, in the concoction of a fiat be established, it has been decided, that the fiat would be superseded even before the finding of the Commissioners (c). And where a commission was sued out upon the petition of the trustee of an equitable creditor, who had signed a composition deed

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(a) This case was heard 18th Feb. 1833, but stood over for judgment until the 8th May 1834; see *post*, and 1 Mont. & Ayr. 457.

(b) See *Blackwell's case*, 1 Vern. 152; *Bennett v. Gandeys*, 1 Show. 200:

(c) *Ex parte Lowe*, 1 G. & J. 78.

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with the bankrupt, the Court superseded the commission in like manner before the adjudication (a). So in *Ex parte Fletcher* (b), although the petition was presented before adjudication, and the Commissioners were ordered to proceed to open the commission, yet the insertion in the Gazette was restrained, with a view to a supersedeas, until the proceedings had been laid before the Lord Chancellor. So, also, after the adjudication, and before the forty-second day, the Court has frequently superseded the commission. Thus, in *Ex parte Harcourt* (c), on a petition presented immediately after the adjudication, the commission was superseded. In *Ex parte Nicholls* (d), also, the Vice-Chancellor said, "the bankrupt is not bound to surrender till the last public meeting;" and on the petition of the bankrupt, which was after the adjudication, and before he had surrendered, the Vice-Chancellor superseded the commission. In one case, indeed, where the petition was not answered in time before the forty-second day, though presented before, the Lord Chancellor required the surrender (e). Yet, in another case, where the bankrupt petitioned to supersede, and died before the last meeting, his representatives were allowed to renew the petition, and the commission was superseded (f). In none of these cases could the bankrupt be required to surrender himself previous to petitioning, because the forty-second day, before which time he cannot be compelled by law to make his surrender, had not yet arrived. In this case, the bankrupt was unconscious of any fiat being issued against him, and ought therefore

(a) *Ex parte Battier*, Buck, 426.

(b) 1 Rose, 336; S. C. 1 Ves. & B. 350.

(c) 2 Rose, 203.

(d) 2 G. & J. 101.

(e) *Ex parte Jones*, 8 Ves. 528.(f) *Ex parte Whittington*, Buck, 235.

to have the same rights as a bankrupt applying to supersede before the forty-second day.

Then, with respect to the act of bankruptcy alleged to have been committed by him in leaving England for America, no inference can be drawn, from the deposition of the act of bankruptcy, that he departed the realm, or continued abroad, *with intent to defeat or delay his creditors*, which is the necessary ingredient in this act of bankruptcy. Before he left England, there was no debt he was bound to provide for, which he had not left his brother-in-law, *Ryle*, the authority and the means to liquidate; and all those creditors who were not actually paid, with the exception of the petitioning creditor, were willing to wait, without any disposition to press for the payment of their debts. There is, therefore, no reason why the Court should not interfere on this occasion to relax the general rule, where it is impossible that the bankrupt could have surrendered in due time. At the time of the issuing of the fiat, he was residing in America; and consequently it was utterly impossible for him to have surrendered on the forty-second day, even if he had been apprised of the fact within a day or two of its issuing; and he can hardly be said to have been guilty of a contempt, as he has never been summoned to surrender (a).

Sir John Cross. If the bankrupt had never received a summons to attend the Commissioners, your last proposition is correct; but if the fact be otherwise, the impossibility of obeying the summons cannot be said absolutely to purge the contempt.

Erskine, C. J. You are not precluded from showing,

(a) It seems extraordinary, that the following authorities were not cited in support of the argument for an occasional relaxation of the general rule: —Per Lord *Hardwicke*, 1 Atk. 222; *Ex parte Lavender*, 1 Rose, 56; *Ex parte Hopkins*, id. 228; *Ex parte Carling*, 2 G. & J. 35.

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that under the circumstances of the case we ought to dispense with the general rule; but then, very special circumstances are required for that purpose.

Mr. *Bethell*, in reply to the arguments against the objection, relied on Sir G. Rose's judgment in *Ex parte Drake* (a), as showing distinctly what the general rule was, and contended that there were no circumstances in this case to take it out of its operation.

Sir G. ROSE.—It may be a question, whether the rule is a wise one, or not, and whether an alteration ought, or ought not, to be made; but in the whole course of my experience I have never yet known it departed from. The bankrupt in this case may petition for liberty to surrender, with a reservation that the surrender is merely for the purpose of applying to supersede; but, without a surrender, no bankrupt can be considered within the jurisdiction of this Court. In *Ex parte Wilkinson* (b), which was a petition by the bankrupt and several of his creditors to supersede the commission, where it appeared that the bankrupt had not surrendered, the Vice-Chancellor dismissed the petition, with costs, as against all the petitioners, except the bankrupt; and I think we ought not to listen to the present application. As to the hardship such a course will inflict upon the bankrupt, it is little more than nominal; for all other remedies, by action, or otherwise, are still open to him, and every protection is offered to him by this Court, except the withdrawal of the fiat; which, I think, under the present circumstances, it is right we should retain until he has

(a) 2 Dea. & Ch. 94.

(b) 1 G. & J. 387.

surrendered. For, unless we have this mode of bringing parties within our jurisdiction, we shall have contempts as common as bankruptcies, and honest creditors will be constantly defeated and kept at arms' length, by bankrupts wilfully keeping out of the jurisdiction of this Court. The proper mode for the petitioner to pursue, is, to petition for an enlargement of the time for his surrender ; after which he may renew his present application, if he thinks proper.

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The COURT, being not quite agreed in opinion, postponed their judgment until the following day, to enable them to look into the authorities.

ERSKINE, C. J.—I have made every research since this case was before us yesterday, but am unable to find any instance, in which a commission has been superseded, under an adverse petition by the bankrupt, on the ground of its invalidity, without his previous surrender. And it is the unanimous opinion of the Court, that this petition should be dismissed ; but as we are not all agreed in our reasons for its dismissal, it will be necessary to explain the grounds of my opinion. (His Honor then stated shortly the facts of the case, and proceeded as follows.) It is somewhat extraordinary in this case, that the assignees, who are bound to support a fiat, should join the bankrupt in this petition, when the petitioning creditor opposes it. It has been said, that the bankrupt had no knowledge of any fiat having been issued against him ; but the present petition is a sufficient answer to any argument founded on that assertion ; which does not, therefore,

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meet the objection that has been raised to this petition, namely, that the bankrupt has not surrendered. There can be no question of the existence of a general rule, that before a bankrupt can be heard upon a petition to supersede, he must surrender to the commission or fiat that has been issued against him; it has been often so laid down by Lords *Eldon* and *Lyndhurst*, as well as by the present Master of the Rolls, and the Vice-Chancellor. It cannot, however, be said to be an inflexible rule; for some peculiar circumstances may arise to warrant the application to supersede, before surrender. Thus, until the advertisement of the bankruptcy in the Gazette, the bankrupt cannot have been cognizant of any requisition to surrender; and it would be an anomaly, therefore, to require him to surrender, before he presents a petition to stay the advertisement; for the very object of staying the advertisement is to prevent the necessity of his surrender, and the injury to his credit. The surrender, also, may have been occasionally dispensed with, on a petition to supersede before the 42d day; but the only case I can find, as an authority for such relaxation of the rule, is *Ex parte Nicholl (a)*, which was decided under very special circumstances; for in that case the proceedings had been suspended, by the reduction of the petitioning creditor's debt; and the bankrupt had no opportunity of surrendering. In the present case, although the petition had been presented before the 42d day, yet it is quite clear that *Kirkman* was not in a condition to surrender, having withdrawn himself from this country, and it being impossible, therefore, that he could have surrendered before the 42d day. I am of opinion, therefore, that we ought not to enter into the question, whether

(a) 3 G. & J. 101.

or not there has been a valid act of bankruptcy, as it is the bankrupt's own fault that he has not surrendered. Besides the numerous previous authorities on the subject, this Court has also determined in several cases that have been brought before it since its establishment, namely, in *Ex parte Drake* (a), *Ex parte Clarke* (b), and *Ex parte Knowlson*, reported in *Montagu* and *Bligh* as *Anonymous* (c), that before the bankrupt petitions to supersede, he must surrender to the fiat, where he presents the petition previous to the expiration of the 42 days. And I have not been able to find any case, where a contrary decision has been come to, on a petition presented after the 42d day; except in those cases, where the bankrupt has been wholly unable to surrender. An attempt has been made to distinguish those cases where the supersedeas has been issued with the consent of creditors, from those where the application has been made by the bankrupt. In *Ex parte Carling* (d) the surrender was certainly dispensed with; but there, independently of the fact of the bankrupt being abroad, the petition was signed by *all* the creditors, on the bankrupt undertaking to pay them a composition of 15s. in the pound. I think, however, it would be wrong to relax the general rule, except under stronger circumstances than are to be collected from the present case. The facts here are, that the bankrupt, being a trader, and being also indebted to several persons, chooses to withdraw himself from this country; and, therefore, it is not competent to him to come by his agent and dispute the validity of the fiat, until he brings himself within the jurisdiction of this Court. It would open the door to great fraud, in my

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(a) 2 Deac. & Ch. 91.

(c) 3 Deac. & Ch. 191; Mont. & B. 416.

(b) *Id.* 194.

(d) 2 G. & J. 35.

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opinion, if we were to allow the supersedeas in the present case. In *Ex parte Foulger*, it is very true that we were inclined to supersede (a), without a previous surrender; but in that case the verdict of a jury had decided that the bankrupt was no trader, and the petitioning creditor had also joined in the petition; while in this case the bankrupt is a trader, and the petitioning creditor opposes the issuing of the supersedeas. Upon the merits of the case, also, as far as we have gone into them, my opinion would have been the same, as I am by no means satisfied that there was not a valid act of bankruptcy.

Sir J. Cross.—I find no general rule, which appears to me to stand in the way of the merits of this petition. I have read all the cases on the subject, and am glad to observe that there is no instance to be met with, where a bankrupt has been required to surrender to an invalid commission. In *Ex parte Peaker* (b), Lord *Lyndhurst* said, “that the question may, for the regulation of such proceedings in future, be deserving of consideration; but I cannot supersede the present commission until the bankrupt shall have surrendered.” But there it was confessed to be a *valid* commission. Now although a general rule, as to the previous surrender of the bankrupt, may be applicable to a *valid* commission, it does not apply to the case of a man who denies that he was a bankrupt. For it seems contrary to reason, and repugnant to every principle of justice, to say to a bankrupt, who disputes all the facts on which the commission against him is founded, “We cannot hear you till you have surrendered.” A man may come before us

(a) This judgment was given before the case of *Ex parte Foulger* was finally decided, for which, see *post*, and 1 Mont. & Ayr. 457.

(b) 2 G. & J. 343.

and allege, without any impeachment of his veracity, "I owe no debt,—I am no trader,—I have committed no act of bankruptcy," or even "I am a peer of the realm,"—and yet he is to be told, "You must come and surrender to the commission, which you say is invalid, before we can permit you to prove its invalidity." Suppose the case of a Governor-General of India or of Canada,—is the same answer to be given to him, on a petition to supersede a fiat issued against him in his absence? I confess, I cannot lend my judgment to such a proposition, which, I think, would be an outrage, not only upon justice, but upon common sense. There are three classes of cases in which this question has been brought before the Court: 1. Where the application to supersede is before adjudication; 2. Where before the expiration of the 42 days; and 3. Where it is made after the 42 days. *Stokes's case* (a) is no authority whatever for saying, that the petition of a bankrupt to supersede cannot be heard before surrender. In that case the Lord Chancellor was called upon to forestall the judgment of the Commissioners, before any meeting had taken place under the commission, and Lord *Eldon* refused to interfere. But is this case any authority for saying that a man, who is on the other side of the Atlantic, and who has never been served with notice of a commission having issued against him, is not to be heard on a petition to this Court, stating that he has committed no act of bankruptcy, until he comes to England and surrenders to a commission which he contends ought never to have issued against him? I, for one, think it is incumbent on this Court to hear the bankrupt, under such circumstances, without compelling him previously to surrender. In

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(a) 7 Ves. 405.

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Ex parte Nicholls (a) the commission was superseded, notwithstanding the bankrupt had not surrendered,—and why? because the commission was *invalid*, there not being a good petitioning creditor's debt. In all the other cases, where the previous surrender was required, the commission was *valid*. That appears to me to make a very important distinction. It may be a question, however, in the present case, whether the bankrupt, instead of applying for the fiat to be rescinded, should not have prayed for a reversal of the adjudication. Now the legislature has nowhere said, that the bankrupt must surrender before he prays for a reversal of the adjudication; but, on the contrary, the 17th section of the 1 & 2 Will. 4. c. 56. expressly authorizes any bankrupt, who shall be minded to dispute the adjudication, to come to this Court to pray a reversal thereof, within two calendar months from the date of such adjudication, if he is residing within the United Kingdom; within three calendar months, if residing in any other part of Europe; or within one year, if residing elsewhere. So that the bankrupt in this case, living as he does in America, has come here for relief long within the time limited by the statute. I am inclined to think it would be a wise rule for us to lay down, that a petition to annul the fiat should not be entertained before a petition to reverse the adjudication. On the present occasion, the Court has been pleased to allow somewhat of a departure from what has been contended to be the general rule; for, though the Court may refuse the supersedeas, they have not refused to *hear* the bankrupt on his petition. And certainly, I could imagine no case fitter to form an exception to that general rule, than the present one,

(a) 2 G. & J. 101.

where the bankrupt has never been summoned, and consequently cannot be guilty of any contempt. The Court has therefore heard the merits of the case.

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Now, with respect to the merits, if I had looked only at the proceedings, I confess I could not have come to the conclusion that this bankrupt had committed an act of bankruptcy. Upon such an act of bankruptcy, as appears on the face of the proceedings, I think the assignees must have been nonsuited in any action. But there is pregnant evidence, from the bankrupt's own statement in this petition, not indeed of actually going abroad with intent to delay his creditors, but of staying abroad with that intent. He states in his petition, that he went to America with the intention of returning. Why did he not return? The only reason he assigns for not coming back is, that he suffered from sea sickness. But there is no doubt that circumstances had occurred in his absence, which rendered it convenient for him to stay abroad. He had become surety for a man of the name of *Simpson*, who had forfeited his engagements, and the bankrupt therefore became liable to pay various sums of money as his surety. The bankrupt, however, pays some creditors, whom he chooses, and does not pay others; he, in fact, takes up such a position, as may enable him to liquidate the debts he likes, and to refuse the payment of the rest. I am therefore of opinion, that his staying abroad was an act of bankruptcy, and that this petition must be dismissed.

Sir G. ROSE.—If any thing was more thoroughly understood than another, I should have thought it would have been the objection to a bankrupt petitioning to supersede, before he had surrendered to his commis-

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sion; which, according to my experience, has been always held conclusive. It is not merely a loose rule of practice, but one that was well settled under the old jurisdiction in bankruptcy, and was considered decisive, whenever it was urged before the Court. It was to be expected, however, that, upon the establishment of a new jurisdiction, there would be some speculation in attempting to deviate occasionally from the former practice; and therefore it was, that this Court, upon first starting, intimated its intention to regulate its proceedings by the rules of that Court, whose jurisdiction had been transferred to it by the act of parliament. The rule, that the bankrupt must surrender before he petitions to supersede, was accordingly acted upon by this Court in *Ex parte Drake* (a), and again in *Ex parte Clarke* (b). I observe, that there is a note (c) of the reporters to the former of these cases, not denying the existence of the rule, but impugning the reason and justice of it; but I do not concur in the observations of those gentlemen. I think there could not be a more mischievous practice than to hold that a bankrupt might apply to supersede a fiat previous to his surrender. If the surrender of the bankrupt, indeed, would conclude or compromise his legal rights in any way, then its necessity might fairly be called in question. But it does no such thing—every remedy is still open to him, nor does his surrender operate in the slightest degree as an estoppel. On the other hand, let us see how the creditors in this case would be dealt with, if this fiat was superseded. The bankrupt, who is a trader, leaves England in 1831, providing for the payment of some debts, but making no provision whatever for others. One of the latter class of creditors issues

(a) 2 Deac. & Chit. 91.

(b) Ibid. 194.

(c) Ibid. 98.

a fiat against him, at a period when he was holding all these at arms' length; and he now comes here, disputing the validity of the fiat, and praying this Court to supersede it. The general rule may possibly admit of some exceptions; and his Honor the Chief Judge has recognized the propriety of relaxing it, where the creditors of a bankrupt petition to supersede a fiat, after the verdict of a jury has been obtained against its validity. But if a verdict is to be conclusive upon the Court, what security has the Court against collusion on the trial? I should say, that even a verdict, in a case like this, ought not to satisfy the Court, unless the petitioning creditor had been a party to the action; otherwise it would in many cases open the door to great fraud; for a creditor might often clandestinely obtain a verdict, for the very purpose of enabling the bankrupt to apply to this Court to supersede the fiat. I think, therefore, that the objection taken to this petition, for want of the bankrupt's surrender to the fiat, is quite sufficient to induce us to dismiss the petition. With regard to the merits of the case, however, there can be but one opinion. I put it yesterday to the gentlemen who argued in support of the petition, do you dispute the legal requisites? For I must say, upon looking at the proceedings before the Commissioners, I never saw a bankruptcy more properly found. The question is, whether, from the facts stated on these proceedings, the Commissioners have drawn a legal inference. But there are certain acts, *per se*, which would lead one to a positive conclusion on the subject, without any inference, and without any recourse to what the witnesses state as their belief. The statement here is, that this trader, being considerably in-

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debted, chose, for some reason or other, to leave the country, and to continue abroad, without any intention to return,—and that in his absence application was made by some of his creditors for the payment of their debts, without obtaining any satisfactory information as to the period of their payment. That they were delayed in the payment of their debts, is a fact unquestionable; and therefore the inference, under these circumstances, is irresistible, of an intent to delay. But it is unnecessary to refer to the proceedings, for the petition itself makes it quite clear what was the bankrupt's motive in continuing abroad. I ask any person to read this petition through, and then say, whether there is not, upon the bankrupt's own statement, admitted to be a good petitioning creditor's debt, and a plain act of bankruptcy. Upon these grounds, therefore, I think the petition ought to be dismissed, with costs.

Petition dismissed, with costs.

Ex parte WILLIAM LEADER.—In the matter of
 WILLIAM LEADER.

Westminster,
 April 15.

Petition for supersedeas with consent of creditors. One dies insolvent after proof, and his executor does not prove the will. *Held*, that his brother-in-law might sign the consent (a).

THIS was also a petition of the bankrupt to supersede, with the consent of creditors. The commission issued on the 11th May 1826, and the assignees appointed, were *Joseph Trovell, George Southey*, and

Another creditor becomes bankrupt, and one of his assignees is abroad; *Held*, that the signature of the other assignee was sufficient, with an affidavit of the consent of the absent assignee.

Another creditor, who had proved a debt as the continuing partner of a firm that had dissolved their partnership, died before his retiring partner: *Held*, that his executrix might sign the consent.

(a) *Sed vide Ex parte Hale, ante, 449.*

George Sargon. All the creditors had signed the petition to supersede, except as follows:

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1st. One creditor, named *James Anderson*, had proved a debt for 1*l*. 6*s*., but his executors had not taken out any probate of his will, his estate being insolvent. The consent to the petition was, however, signed by *William Lane*, his brother in law.

2d. One of the creditors, *William Mason*, who had signed the consent, and who had proved a debt of 160*l*., had since become a bankrupt, and his assets had been wholly distributed. The consent was only signed by one of his co-assignees, the other assignee being in France.

3d. Another creditor, of the name of *John Marks*, had proved a debt of 51*l*., as due to him and his late partner *William Marks*, the dissolution of whose partnership had been announced in the Gazette, by a notice stating that the debts were to be received by the said *John Marks*. *William Marks*, however, the retiring partner, survived his partner, *John Marks*; but *William Marks* was also since dead; and the consent had only been signed by *Sarah Marks*, the executrix of *John Marks*.

The Registrar, under these circumstances, thought the signatures to the consent were not sufficient.

Mr. *Swanston* now applied to the Court to make the usual order.

The COURT granted the application, on producing a proper affidavit of the facts, and the consent of the absent assignee of *William Mason*.

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Southampton
Buildings,
March 5.

An official assignee, having no funds in hand, cannot be compelled to join in a suit in equity, with the other assignees, without being indemnified as to the costs.

But if he improperly refuses to join in such suit, he may be made a defendant, and then incur the risk of having to pay his own costs.

Ex parte DAVID EVANS and others.—In the matter of THOMAS DODGSON, and THOMAS HARTLEY.

THIS was the petition of the creditors' assignees, praying that the official assignee might be ordered to join in a suit, which the former intended to bring against a party for the recovery of a certain portion of the bankrupts' property.

The petition stated, that one *Thomas Hartley*, by his will dated the 23d September 1806, gave and bequeathed five sixth parts of the residue of his personal estate to his son *Thomas Hartley*, one of the above-named bankrupts, and appointed his wife, *Jane Hartley*, and two other persons, executrix and executors of his will. On the 25th March 1808 the testator died, and the will was afterwards duly proved. It was alleged, that after payment by the executors of all the funeral and testamentary expenses, and the debts and legacies of the testator, out of his personal estate and effects, there remained a very considerable surplus to be divided between the residuary legatees, part of which only the executors had paid over to the bankrupt, retaining in their hands a great part of the residue, to indemnify themselves against some claim, which it was supposed might afterwards be made against the estate of the testator. Two of the executors were dead, and the whole of the testator's personal estate unadministered, consisting of the sum of 2650*l.* three per cent. consolidated annuities, and the subsequent dividends received thereon, was in the possession or sole power of the surviving executor, *John Tweedy*.

The commission issued on the 31st December 1828, and by an order of Mr. Commissioner *Fane*, to whom the proceedings under it were transferred, dated the

24th September 1833, *William Turquand* was duly appointed the official assignee, but without any requisition on the subject by the petitioners, or any creditor of the bankrupts.

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The petitioners stated, that they had frequently applied without effect to the surviving executor to come to an account with them, in respect of the personal estate and effects of the testator; and that they were now desirous of instituting a suit in Chancery against the executor, for the purpose of having such account taken, and recovering the bankrupt's share of the residue; the institution of which suit had been duly authorized by the creditors of the bankrupts. The petitioners alleged, that they had applied to the official assignee, and requested him to join them as a co-plaintiff in the intended suit, but that he had refused to do so, unless the solicitors of the petitioners would expressly undertake not to look to him for costs, nor unless the petitioner would sign a written undertaking, indemnifying him from all costs as a co-plaintiff in the suit. The petitioners submitted, that it was the duty of the official assignee to join with them as a co-plaintiff in the intended suit, and that he was not entitled to such undertaking; and they stated, that their solicitors had intimated to the official assignee, that they waived all claim on him for the costs of the suit.

The petition therefore prayed, that the official assignee might be ordered to join the petitioners as a co-plaintiff with them in the intended suit; or, if he should decline so to do, that he might be removed from being such official assignee, and that the costs and expenses of such removal, and of this application and consequent expenses thereon, might be paid by the official assignee, or out of the estate.

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It appeared, that an application had been already made to Mr. Commissioner *Fane* on the subject of this petition, and that he had refused to order the official assignee to join in the intended suit. It was shown, also, that the official assignee had no funds in his hands belonging to the bankrupt's estate, out of which he could indemnify himself.

Mr. *Swanston*, and Mr. *Purvis*, for the petitioners. By referring to the 1 & 2 W. 4. c. 56. ss. 22, 25, 26, and 40, it is manifest, that the official assignee is as necessary a party, as the creditors' assignee, to any suit instituted touching the bankrupt's estate; and unless he is joined as a co-plaintiff, in the present instance, the suit will be defective for want of parties. In a case, which will be presently adverted to, an ordinary assignee has been compelled to join in a suit as co-plaintiff. Then why should not an official assignee be equally compellable? An ordinary assignee undertakes his office, without the least remuneration; while an official assignee is paid a large percentage for his trouble. The legislature, when it directed this mode of payment, must have had in view that risk and trouble, which the official assignee in this case is required to take upon himself. In the present instance, the party, by accepting the office of official assignee, generally, took upon himself all this responsibility, whenever the interests of any particular bankrupt's estate, to which he might be appointed to act, required that he should do so. He is, in fact, in the same situation as any other trustee, who is bound to join in suits for the benefit of the estate. It is the duty of the creditors' assignees to continue a suit commenced by a bankrupt before his bankruptcy, if the benefit of the estate requires it (a). If they neglect this

(a) *Sharp v. Hallett*, 2 Sim. & St. 496.

duty, they are responsible to the creditors. So, also, is the official assignee. And the test of that liability is, whether, or not, it is for the benefit of the creditors to institute the suit. Here, however, the official assignee, being nothing more than a co-trustee, requires an indemnity from his co-trustees. There is no instance, in which such a requisition was ever sanctioned by any Court. Trustees might perhaps claim an indemnity from their *cestui que trust*, but certainly not from each other. There might also in this case, in the event of one of the assignees having to pay these costs, be a right in him to call upon the co-trustees to contribute their proportion, in order that the burthen might fall equally on all. Thus, in *Lingard v. Bromley* (a) contribution was enforced among assignees in bankruptcy, to reimburse a payment by one under an order for a loss occasioned by their joint act. And the objection that the defendants acted only for conformity's sake, upon the representation and advice of the plaintiff, did not prevail. Surely, therefore, if there is a right to contribution among trustees, there can be no right in one of them to call on the others to indemnify him against a participation in the probable loss.

From the arguments in the case of *Wilkins v. Fry* (b) it is to be collected, that where the interests of creditors are at stake, not only is their consent necessary to a suit, but all the assignees must be parties as plaintiffs, in order to testify the assent of the creditors. And in *Occleston v. Benson* (c), a plea, that the consent of creditors did not, on the bill, appear to have been obtained, was allowed. Where the creditors give their consent to the assignees to commence a suit, it is not

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(a) 1 Ves. & B. 114.

(b) 1 Mer. 244,; S. C. 2 Rose, 371.

(c) 2 Sim. & S. 265.

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presumed to be given to a portion only of the assignees; neither, indeed, would the legal title be properly represented by only a part of them. And where assignees are necessary parties as plaintiffs, and one refuses to join, the case of *Wilkins v. Fry* (a) shows that the Lord Chancellor would, on a proper case made before him, direct the assignee to join. If, indeed, any thing were wanting to show, that the official assignee is a proper and necessary party in a suit or action, the case of *Munk v. Clark* (b) will fully demonstrate that necessity.

Mr. *Bethell*, for the official assignee, was stopped by the Court.

ERSKINE, C. J.—Before you can call upon the Court, either to order an assignee to join as a plaintiff in a suit,—even supposing that in any case the Court has such power,—or to remove him on the ground of such refusal, at least, you must show that you cannot proceed in the suit without his being made a party to it, or that the estate will be injured by retaining him in his office; and it is immaterial to this question, whether it be an official, or an ordinary, assignee. It strikes me, that neither of these two points are made out on this petition; for although it is necessary that an official assignee should join as a plaintiff in an action at law, yet no authority has been cited to show that he must do so in a suit in equity, or that the omission to join him as a plaintiff will in any way interfere with the success of the suit. There seems to be no obstacle to making the official assignee a defendant, if he will not be a

(a) 1 Mer. 253.

(b) 10 Bing. 102. And see *Baker v. Neave*, 3 Tyrw. 233; S. C. 1 Crompt. & M. 112, where it was decided that an official assignee must be joined in an action brought by the other assignees.

plaintiff. Now, if he is made a defendant in the suit, after refusing to join as plaintiff, and the plaintiffs obtain a decree in their favour, and thus show that the suit was properly instituted by them, the official assignee will in that case incur the risk of being compelled to pay his own costs. With that, however, we have nothing to do. It is sufficient for us to say, that we cannot make the order prayed by this petition.

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Sir J. CROSS.—It has been contended, in support of this petition, that the rights and obligations of the official, and of the creditors', assignee are precisely the same. In this I cannot concur. In some respects, it is true, they correspond, viz. inasmuch as they are both joint trustees, and legal owners of the bankrupt's estate; but here I think the coincidence stops. The official assignee is a public officer; the creditors' assignee a mere private one. The official assignee is appointed for the greater security of the creditors' property, and to see that the duties of the creditors' assignee are more effectually discharged, than they used to be. But I think the most essential difference between the two, and the distinction which more immediately bears upon this case, is, that the official assignee has no power whatever to interfere in any manner with the appointment of the solicitor, who is to conduct this suit. In ordinary cases, every suitor has a right to appoint his own solicitor; here, if this application were granted, he would have none. The official assignee, therefore, insists that he cannot be compelled to join in a suit so conducted, and that it is no part of his duty, as a public officer, to interfere with it in any manner whatever; and I think he is right in such refusal. For the

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law always looks to the protection of public officers; and if official assignees were liable to be sued, and called on to sue, in all cases connected with their duties, they might very soon be ruined by costs, without having any other interest whatever at stake. Under the old law, when it was necessary that commissioners should be made litigating parties, from the circumstance of having been joined in any conveyance of the bankrupt's property, they were protected by a covenant of indemnity from the assignees, or other party to the conveyance. Then, why should not the official assignee in like manner be indemnified? But I ground my judgment in this case, principally, upon the point of the choice and appointment of the solicitor, which, in my opinion, is quite sufficient to decide this case. I therefore think, there is no right in these petitioners to compel the official assignee to join in this suit, without giving him an indemnity. But even supposing we were to remove him for his refusal to join in the suit, what would be the result? Why the creditors' assignees would be left to fight the suit at their own responsibility, just as they will be by our present decision.

Sir G. ROSE.—The first question is, could an ordinary assignee be compelled to do what the petitioners now seek of the official assignee? For it is conceded to the petitioners, that an official assignee stands in no other position than the creditors' assignee. I conceive, that neither could be compelled to act in the mode proposed, without an indemnity. As the law stood at the time of the case of *Wilkins v. Fry*, it was certainly considered to be necessary that all the assignees should be plaintiffs in a suit, for the reasons which have been properly assigned by the counsel for the petitioners.

But that has ceased to be thought needful; and the wiser decisions and practice of modern days have allowed the assignee, refusing to be a plaintiff, to be made a party defendant, just like any other individual who refuses to join in a suit. The Courts, indeed, have latterly regarded a question of this kind principally with reference to the costs, viz. whether the party who refuses, and is in consequence made a defendant, shall be allowed to throw the additional burthen of his individual costs upon the trust estate. Thus, in *Jones v. Yates (a)*, a demurrer to a bill by assignees of a bankrupt, on the ground that it did not state the suit to be instituted with such consent of creditors as is required by 6 Geo. 4. c. 16. s. 88, was overruled by Lord Chief Baron *Alexander*, after mature deliberation and consultation with the other equity judges,—the Chief Baron considering, that the assignees were not to be concluded by the statute from bringing actions and suits without the consent of creditors, but that it was merely intended that, as between the creditors and the assignees, the assignees, if they brought an action &c. without such consent, should be responsible for the costs, if they ultimately failed. The necessity of such consent, then, being no longer essential to the suit, there can be no doubt but that a dissenting assignee may be made a defendant. In the case of other trustees, it is the ordinary and every day's practice, to make any one dissenting from the institution of the suit a defendant, instead of a co-plaintiff. It is quite immaterial, there-

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(a) 3 Y. & J. 373. So in *Piercy v. Roberts*, 1 Myl. & Keen, 4. it was held, that in a suit by the assignees of an insolvent's or bankrupt's estate it was not competent to the defendant to object that the suit had been instituted without the consent of the creditors. For though the judgment in such case will bind the creditors, yet the assignees take upon themselves the responsibility that the suit has been properly instituted and properly conducted.

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fore, whether on this occasion the official assignee is made plaintiff, or defendant. It must not be understood, however, that I look upon it as the right of an official assignee to hold back from mere caprice, on occasions of this nature, and thus embarrass the other assignees in the prosecution of a necessary suit. For if, in consequence of his refusal to join as a plaintiff, the assignees have been compelled to make him a defendant, the question as to the allowance of his costs would most certainly be afterwards discussed; and if his refusal has proceeded from any improper motive, he would not be allowed his costs out of the bankrupt's estate. This salutary power, which the Court possesses, would be a sufficient check upon any vexatious conduct of the official assignee. In the present case, however, the official assignee has acted most fairly and properly; he has consented to be made a plaintiff, if the others will indemnify him. He has no funds in hand, whereby he can reimburse himself; and therefore I think he would be entitled to have his costs repaid by the petitioners, if they should still refuse to indemnify him, and make him a defendant in the intended suit. It would have been better, perhaps, if the official assignees had not been vested by the act of parliament with any interest in bankrupts' estates; for then no embarrassing question of pleading would have arisen, as to making them parties to any action or suit for the recovery of the bankrupt's property. I think, under all the circumstances, that this petition should be dismissed with costs. But, as it appears to have been presented under the advice of counsel, the assignees may reimburse themselves their costs out of the first money that comes to their hands belonging to the bankrupt's estate.

So ordered accordingly.

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Ex parte RICHARD FARDEN and ANNA MARIA, his wife.—In the matter of WILLIAM PETERS.

Westminster,
June 7.

THIS was a petition that a claim on behalf of the petitioners might be entered on the proceedings, under the following circumstances:—In April 1828, the petitioners filed their bill in Chancery against the bankrupt and other defendants, praying that a partnership then subsisting between the petitioners and the defendants might be dissolved, and an account taken of the partnership property, &c. On the hearing of the cause, a reference was directed to the Master to take the account; and exceptions having been taken to his report, a further reference was directed on the hearing of the exceptions, and the bankrupt was, in the meantime, ordered to pay the sums of £606 and £1400 into Court.

Where a sum has been ordered to be paid into Court by the bankrupt in a suit in Chancery still pending against him, a claim was ordered to be entered on the proceedings for that amount, and the assignees were directed to reserve dividends on that sum, to be paid to the Accountant-General to the credit of the suit in Chancery.

While the proceedings were in this state, viz. in Dec. 1832, a fiat issued against *William Peters*, and the suit in Chancery consequently became defective for want of parties.

On the 24th December 1832, proof of the two sums above mentioned was tendered by the petitioners claiming to prove under the Master's report already made, but the proof was rejected by the Commissioners; and they also refused to allow any claim to be made unless the reference to the Master was proceeded in, and the account taken over again.

In January 1833, the petitioners filed a supplemental bill, making the bankrupt's assignees parties to the suit, who put in their answer, admitting the facts.

The amount of debts proved did not exceed 300l.; and a meeting for a final dividend having been adver-

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tised, the petitioners prayed that a claim might be ordered to be entered upon the proceedings for the sums of 606*l.* 15*s.* 6*d.* and 1400*l.*, without prejudice to the right of proceeding in the suit; and that the assignees might be ordered, out of the assets in their hands, or under their control, to pay into the Bank of England, to the credit of the Accountant General of the Court of Chancery, to the account of this petition, a sum sufficient to pay a dividend upon the said sums of 606*l.* 15*s.* 6*d.* and 1400*l.*, rateably with the other creditors who had proved; and that in case of any future dividend, it might be declared on the said claim, and the amount paid into the bank in like manner, and that the costs of the petition might be paid out of the bankrupt's estate.

Mr. *Swanston* and Mr. *Flather* appeared in support of the petition.

Mr. *Koe* appeared for the assignees.

The COURT made the following Order,—that a claim be entered on the proceedings under the fiat, on behalf of the petitioners, for the several sums of 606*l.* 15*s.* 6*d.* and 1400*l.*, without prejudice to the petitioner's right of proceeding in the said suit. And that the assignees, out of the assets in their hands, should pay into the bank, with the privity of the Accountant General of the Court of Chancery, to the credit of *William Peters*, a bankrupt, and of the suits of *Farden* and wife against *Peters*, and *Farden* and wife against *James*, and to an account to be entitled the account of *Richard Farden* and

wife, a sum of money sufficient to pay a dividend upon the said sums of 606*l.* 15*s.* 6*d.* and 1400*l.*, rateably with the creditors who have proved, not disturbing any dividend already declared; the amount to be verified by affidavit, and the Accountant General to declare the trusts thereof accordingly, subject to further Order; and that any dividend to be thereafter declared, be declared as well upon the amount of the said claim, as upon the amount of the other debts proved, and be paid to the Accountant General to the like account. And that the costs of all parties should abide the results of the suits in Chancery, and be considered costs in such suits, if the Court of Chancery think fit; with liberty to apply. This Order to be entered with the registrar of the Court of Chancery, if that Court should think fit. (a)

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and another.

(a) This Order, being rather a peculiar one, is given at more length than is usual.

Ex parte FRANCIS REED and the Rev. WILLIAM ALDRICH.—In the matter of CHARLES CALDWELL, THOMAS SMYTH, JOHN FORBES, and DANIEL GREGORY.

Westminster,
November 12
and 14.

THE petitioners in this case were the executors of *James Reed*, surviving partner of the firm of *Reed and B. & Co.*, being largely indebted to *R. & Co.*, indorse to them various bills, which had been drawn or indorsed by *C. & Co.* for the accommodation of *B. & Co.* *B. & Co.*, and *C. & Co.*, respectively become bankrupt, and *R. & Co.* prove the bills under each commission: Held, that the estate of *C. & Co.* was a security to make good the amount of principal and interest due to *R. & Co.* from *B. & Co.*, and that *R. & Co.* were entitled to receive dividends on their proof under *C. & Co.*'s commission, until not only the balance of the principal sum due from *B. & Co.*, but also all interest thereon, was fully satisfied.

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Parkinson, who had proved various bills against the estate of the bankrupts, which had been indorsed to *Reed* and *Parkinson* by *G. and H. Browne*, as a security for a debt due to them from *G. and H. Browne*, and of which bills the bankrupts were either the drawers or indorsers. And the question was, whether the petitioners were entitled to continue to receive dividends on such proofs, until not only the amount of the debt due to *Reed* and *Parkinson* from *G. and H. Browne*, but also the interest on such debt, was completely satisfied. The facts of the case were as follows:—

The bankrupts were bankers at Liverpool, carrying on business under the firm of *Charles Caldwell* and Co.; *Reed* and *Parkinson* were merchants in London; and *G. and H. Browne* carried on business at Liverpool. *Reed* and *Parkinson* were the correspondents and agents in London of *G. and H. Browne*, for whom they were in the habit of making large advances.

On the 5th March 1793, a commission of bankrupt issued against *G. and H. Browne*; and on the 23d March 1793, a commission issued against *Caldwell* and Co.

At the time of the bankruptcy of *G. and H. Browne*, there was due from them to *Reed* and *Parkinson*, upon the balance of all accounts between them, the sum of 20,694*l.* 1*s.* 11*d.*, for which *Reed* and *Parkinson* held as a security divers bills of exchange, amounting altogether to the sum of 26,109*l.* 15*s.* 7*d.*; and amongst them bills to the amount of 23,653*l.* 5*s.* 4*d.*, drawn or indorsed by *Caldwell* and Co. in favour of *G. and H. Browne*, and indorsed by the latter firm to *Reed* and *Parkinson*, as a security for the said debt of 20,694*l.* 1*s.* 11*d.* On the 10th May 1793,

Reed and *Parkinson* proved under the commission against the said *G.* and *H. Browne* the said sum of 20,694*l.* 1*s.* 11*d.*, which was stated in their deposition to be due to them, on the balance of accounts, for money paid and advanced by them to or to the use of the said bankrupts, and for interest due thereon, and for commission and postage of letters; for which said sum, or any part thereof, *Reed* and *Parkinson* had not received any security or satisfaction whatsoever, save and except the bills of exchange set forth in the schedule to the said deposition, amounting altogether to the sum of 26,109*l.* 15*s.* 7*d.*, which included the said bills for 23,653*l.* 5*s.* 4*d.* so respectively drawn or indorsed by *Caldwell* and Co. in favour of *G.* and *H. Browne*.

On the 21st May 1793, *Reed* and *Parkinson* also exhibited their deposition under the commission against *Caldwell* and Co., wherein it was stated that the bankrupts were justly and truly indebted unto them in the sum of 23,653*l.* 5*s.* 4*d.*, upon or by virtue of the several bills of exchange mentioned and set forth in the schedule thereunder written; all which said bills were either drawn or indorsed by the said bankrupts, and were indorsed to *Reed* and *Parkinson* by *G.* and *H. Browne*, or remitted and paid by them to *Reed* and *Parkinson* for a valuable consideration; that is to say, for monies actually advanced and paid by *Reed* and *Parkinson* to or to the use of *G.* and *H. Browne*; for which said sum, or any part thereof, *Reed* and *Parkinson* had not received any security or satisfaction whatsoever, except the said bills to the amount of 23,653*l.* 5*s.* 4*d.*, which were enumerated in the schedule, and except also certain other bills of exchange in the

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said deposition referred to, but to which the said bankrupts were not parties. On exhibiting this deposition, the Commissioners made a special memorandum on it, admitting it as a proof to all purposes, but that of receiving a dividend; before which, it was expected that *Reed* and *Parkinson* should state upon oath how much they had paid, or how much was actually owing to them, upon the security of the bills stated in the deposition.

Before any dividend was declared under either of the commissions, *Reed* and *Parkinson* received payment in full from the acceptors respectively of seven of the bills of exchange before mentioned, to the amount of 4126*l.* 10*s.* 3*d.*

On the 13th May 1794, a dividend of 1*s.* in the pound was declared under the commission against *Caldwell* and Co.; which dividend was paid to *Reed* and *Parkinson* upon the sum of 19,526*l.* 15*s.* 1*d.*, being the balance of their proof of 23,653*l.* 5*s.* 4*d.* under that commission, deducting the sum of 4126*l.* 10*s.* 3*d.*, the amount of the bills so paid in full by the acceptors. And on the 17th June 1796, the Commissioners under the commission against *Caldwell* and Co., with the consent of *Reed* and *Parkinson*, made a formal order upon the proceedings, that their proof of 23,653*l.* 5*s.* 4*d.* should be reduced to the sum of 19,526*l.* 15*s.* 1*d.* On the 23d July 1796, the 20th January 1802, the 27th May 1805, and the 13th August 1811, further dividends of 2*s.*, 1*s.*, 2*s.*, and 8*d.* in the pound were respectively declared under the commission against *Caldwell* and Co., which were paid to *Reed* and *Parkinson* upon their reduced proof of 19,526*l.* 15*s.* 1*d.*

The sum of 6336*l.* 2*s.* 1*d.*,—being the amount of the

said bills for 4126*l.* 10*s.* 3*d.*, and of certain other bills to which *Caldwell* and Co. were no parties, and which were paid in full,—was deducted from the said sum of 20,694*l.* 1*s.* 11*d.*, proved by *Reed* and *Parkinson* under the commission against *G. and H. Browne*; and the Commissioners under that commission ordered their proof for 20,694*l.* 1*s.* 11*d.* to be reduced to 14,357*l.* 19*s.* 10*d.* On the 30th December 1794, the 21st March 1800, and the 1st February 1805, dividends of 2*s.*, 1*s.*, and 9*d.* in the pound were declared under the commission against *G. and H. Browne*, which were respectively paid to *Reed* and *Parkinson*, upon such reduced proof of 14,357*l.* 19*s.* 10*d.*

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None of the bills held by *Reed* and *Parkinson*, at the time of the respective bankruptcies of *Caldwell* and Co. and *G. and H. Browne*, had been paid in full, save these before stated; but *Reed* and *Parkinson* received dividends on several of these bills from other persons who were parties to them, by which means the original debt due to them from *G. and H. Browne* had become greatly reduced.

The petitioners contended that this debt was one which, by the custom of merchants, and the course of dealings between the parties, carried interest at the rate of five per cent. per annum. And they stated, that by charging *G. and H. Browne* with interest upon such debt, and crediting them with the several sums of money received in respect thereof, at the respective dates when the same were received, there would still remain due and owing from *G. and H. Browne* to *Reed* and *Parkinson* the sum of 5000*l.* and upwards, and that, without charging such interest, there would remain due the sum of 546*l.* 3*s.* 9*d.*

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On the 19th February 1833, a further dividend of one shilling in the pound was declared under the commission against *Caldwell* and Co. amounting, upon the proof of *Reed* and *Parkinson*, to the sum of 976*l.* 6*s.* 9*d.*

Reed survived his partner *Parkinson*, and died in December 1831, leaving the petitioners his executors.

The petitioners applied to the assignees under the commission against *Caldwell* and Co. to pay them the said sum of 976*l.* 6*s.* 9*d.*, the amount of the last dividend of one shilling in the pound upon their proof for 19,526*l.* 15*s.* 1*d.* This the assignees declined to do; but offered to pay the sum of 546*l.* 3*s.* 9*d.* as the balance of the proof for 14,357*l.* 19*s.* 10*d.*, which would remain due from *Reed* and *Parkinson* to *G.* and *H. Browne*, without reckoning any interest. The petitioners however submitted, that the estate of *Caldwell* and Co., as the drawers and indorsers of the said bills of exchange in favour of *G.* and *H. Browne*, was liable to pay dividends upon the full amount of such bills, until their estate had paid 20*s.* in the pound thereon; and that *Reed* and *Parkinson*, who held these bills as a security for a debt due to them from *G.* and *H. Browne*, were entitled to receive such dividends from the estate of the said *Caldwell* and Co. for their own use, until the full amount of the principal debt and interest due to them from *G.* and *H. Browne* was fully paid; and that thereupon *Reed* and *Parkinson* would become, in respect of such proof, trustees for *G.* and *H. Browne*, who would then be entitled to receive all further dividends upon the proof until 20*s.* in the pound should be paid thereon.

On the other hand, the assignees of *Caldwell* and Co. contended, that the several bills of exchange, so re-

spectively drawn or indorsed by *Caldwell* and Co., being for the accommodation of *G. and H. Browne*, the petitioners had no interest in the proof, after satisfaction of the debt due from *G. and H. Browne* to *Reed* and *Parkinson*.

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The petitioners stated, that they were entirely ignorant of the state of accounts between *Caldwell* and Co. and *G. and H. Browne*, but that they were advised that although these bills might have been drawn and indorsed by *Caldwell* and Co. for the accommodation of *G. and H. Browne*, yet that this could not affect the rights of *Reed* and *Parkinson*, which must be decided in precisely the same manner, as if the bills had been drawn or indorsed by *Caldwell* and Co. for an actual debt due from them to *G. and H. Browne*.

The petition prayed, therefore, that it might be declared that the petitioners, as the legal representatives of *Reed* and *Parkinson*, were entitled to receive dividends upon the said proof for 19,526*l.* 15*s.* 1*d.* under the commission against *Caldwell* and Co., until the debt due to *Reed* and *Parkinson* from *G. and H. Browne*, with the interest thereon, should be fully paid and satisfied ; and that *John Bolton*, the surviving assignee of *Caldwell* and Co., might be ordered to pay to the petitioners the said dividend of one shilling in the pound upon their said proof.

Mr. *Turner*, who appeared for the petitioners, said that they did not seek to receive more than the amount of the debt due to *Reed* and *Parkinson* from *G. and H. Browne*, together with lawful interest on such debt. There were several authorities in support of the prayer

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of the present petition. In *Ex parte Martin* (a), a creditor, with whom a bill of exchange had been deposited as a security, had proved his debt against the estate of the drawer, his principal debtor, and thereby and by other means reduced his debt to 14*l.*; and the acceptor having subsequently become bankrupt, the creditor was held to be entitled to prove under the commission against the acceptor, not only the balance of 14*l.*, but all the interest upon his debt at the time of making that proof, to the complete liquidation of the account, in respect of which he held the bill as a security. So in *Ex parte Sammon* (b), where bills amounting to 1320*l.* had been delivered by the drawer to a creditor as a collateral security for a debt of 4000*l.*, and both the drawer and acceptor became bankrupt, but the estate of the acceptor proved solvent; it was held, that the creditor was entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also to prove the whole amount of the debt under the commission against the drawer, and receive dividends on such proof, in liquidation of the balance remaining due.

Mr. *Ellison*, for the surviving assignee of *Caldwell and Co.*, said, that he was quite willing to act in any way the Court should direct.

The COURT said, that the estate of *Caldwell and Co.* was a security to make good the amount of the principal debt and interest due to *Reed and Parkinson*

(a) 2 Rose, 87.

(b) 1 Deac. & Ch. 565.

from *G. and H. Browne*, and that the authorities were decisive.

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Ex parte
Rend
and another.

The Order was therefore made as prayed, and the costs were directed to be paid by the estate of *Caldwell* and Co.

Ex parte PRICE.—In the matter of PRICE.

Westminster,
November 13.

THIS was the petition of a creditor to prove a debt, the proof for which, with the exception of 20*l.*, had been rejected by the Commissioners, who, on inspection of the petitioner's accounts, conceived that the entries in his books had been recently made for a fraudulent purpose. The petition also prayed for the costs of the application.

Where, after the rejection of a proof by the Commissioners, the creditor on petition succeeds in establishing his debt by the affidavits of witnesses, who were not tendered to the Commissioners for examination, he pays his own costs.

Mr. Swanston, and *Mr. Anderdon*, in support of the petition, stated that the claim of the petitioner was for his work and labour, and materials found by him for the bankrupt; and that the truth of his claim was supported by the affidavits of four witnesses.

ERSKINE, C. J.—It does not appear from the proceedings, that these witnesses were ever tendered to the Commissioners, although the Commissioners stated that they were not satisfied with the proof adduced, and required further evidence. Then how can we decide this case, except by referring it back to the Commissioners, in order to give the petitioner an opportunity of producing these witnesses before them. The whole

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case will turn upon the sufficiency of this additional evidence. Ought not the opposite party to have some opportunity of examining those witnesses, instead of receiving their affidavits? Then, as to the question of costs. If the rejection of the proof was by the erroneous judgment of the Commissioners, the petitioner is not entitled to costs.

Sir G. Rose.—The only correct mode we have of ascertaining the fact, whether or not further evidence was tendered to the Commissioners, is either by their certificate, or by looking into the proceedings. Now, there is no memorandum to this effect on the proceedings.

Mr. Swanston. The petitioner expressly states in his affidavit, that he offered to prove the correctness of his account by workmen and other witnesses; and the only denial of this fact is by an affidavit of the solicitor of the assignees, who swears that he has no recollection of any other witnesses being tendered in support of the petitioner's proof. A certificate from the Commissioners, therefore, is wholly unnecessary, when it is already sufficiently clear that further evidence was tendered and rejected by them. If the Court, then, after consideration of the affidavits, should think the proof admissible, the costs of the petitioner ought to be allowed; for as the rejection of the proof was so hasty and improper, this case forms an exception to the general rule, that costs are not given against a decision of the Commissioners. The Commissioners have, in fact, not exercised a deliberate judgment.

Mr. *G. Richards*, and Mr. *Bacon*, for the assignees, contended that the petitioner had no claim whatever to the costs; for that when he produced his books before the Commissioners to establish his proof, all the entries, which constituted the items of his claim, were discovered to be entered together in one place. This the Commissioners thought so suspicious a circumstance, as to require further evidence of the debt; and there the matter rested, for no further evidence was ever produced by him.

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ERSKINE, C. J.—The affidavits of the four workmen are, certainly, sufficiently specific, as to the performance of the work by the petitioner for the bankrupt; and if any doubt had been thrown on their evidence, then I should say, that they should be examined *vivâ voce*. But the truth of their statements has not been called in question by the respondents. The question then of proof having been disposed of, nothing now remains but the question of costs. Now, the practice is clear, that when a party complains of a decision of the Commissioners, the rule is not to burthen the bankrupt's estate with the costs of the petition, although their decision is reversed; unless indeed there is any imputation against them, or the assignees, with regard to the suppression of evidence, or the like; which would then take the case out of the general rule. The rule, I admit, may sometimes bear hard upon petitioners; but it would be equally a hardship to make the estate, that is, the other creditors, pay for an error in judgment of the Commissioners. If the petitioner in this case had actually tendered his witnesses, and the Commissioners had refused to examine them, then I should

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**Ex parte
Payor.**

have thought that he ought not to be put to the expense of this petition. But that fact is not satisfactorily proved. The proof is therefore now allowed by this Court, upon the affidavits of witnesses, who were not tendered for examination to the Court below; and there can be no reasonable doubt, that the Commissioners would not have rejected the proof, if they had examined these witnesses. Under all the circumstances, therefore, I do not think it would be just to saddle the estate with the petitioner's costs.

Sir J. Cross.—I entirely concur in what has fallen from his Honor the Chief Judge. There are two sorts of rejection of a proof by the Commissioners. The first is, when it is rejected by them, without any opposition to it by the assignees. The second is, when the assignees oppose the proof. Here, the assignees opposed the proof by charging the petitioner with fraud, and the Commissioners rejected it. The petitioner, however, has since fortified his claim by four witnesses, who prove the debt to demonstration; but this evidence was not produced before the Commissioners, and therefore the petitioner, though successful in his present application, is not entitled to costs. There is no question but that a party may support his claim in this Court by other evidence than what he adduced before the Commissioners; but the consequence will usually be, that although the decision of the Commissioners is reversed, he pays his own costs. If the petitioner, in this case, after stating the nature of the additional evidence he could produce in support of his debt, had afterwards gone before the Commissioners again and tendered his witnesses, as he ought to have done, and

the Commissioners had still rejected his proof, then the case would have been different.

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Ex parte
Paine.

Sir G. Rose.—The petitioner having established his case as to the admission of his proof, all that we have now to decide is, as to the question of costs. Upon this there is no doubt, that as the additional evidence he has produced this day was not actually tendered by him to the Commissioners, he must pay his own costs.

The Order was, that the proof should be admitted,—the assignees to be allowed their costs out of the estate,—and the petitioner to pay his own.

Ex parte Howes.—In the matter of DARKLY.

Westminster,
November 13.

IN this case a fiat had been issued against the bankrupt on the 5th November, which the petitioning creditor had since discovered he could not support, on account of his inability to prove the trading. The present petition, therefore, was presented by another creditor, praying that the first fiat might be superseded, and for leave to issue a fresh fiat.

The petitioning creditor, after issuing a fiat, found he could not support it, on account of his inability to prove the trading. The Court refused to permit another petitioning creditor to issue a second fiat, before the time for proceeding in the first was expired.

Mr. G. Richards read an affidavit of the petitioning creditor in support of the present petition, wherein it was stated, “that since the debt was contracted, there had been no act of trading.”

The COURT said, that the affidavit did not state that

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Howes.

the bankrupt had not actually traded *at the time* of the debt being contracted, though it was sworn he had not traded since; and they declined to interfere in the matter, or allow the petition to be amended.

November 15.

Mr. *Richards* mentioned the case again this day, when he stated that he was now prepared with a fresh affidavit; wherein it was positively sworn, that the bankrupt was no trader at the time of the contracting of the debt, nor was he a trader at any time since. He urged the importance of superseding the first fiat, and permitting another to issue *instantly*; for that as the terms of the General Order prevented any other fiat from being issued against the bankrupt, until the time for proceeding in the first was expired, the bankrupt might in the meantime be wasting his estate, and so render any second fiat that might be issued against him of no effect.

The COURT, however, still declined to interfere; the Chief Judge observing, that there must be some very imminent peril threatening the creditors, to induce the Court to grant the prayer of the present petition.

Petition dismissed.

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Ex parte BRAY.—In the matter of BRIDGWOOD.

THIS was the petition of three creditors, praying for leave to prove their debts, and that the bankrupt's certificate might be stayed. The fiat, which was executed at Stafford, was issued in June last,—the adjudication was in July,—and the public meetings advertised for the 9th and 13th August. The petitioners resided in Cornwall, and their debts amounted to 714*l.*, which was sufficient to turn the certificate.

Westminster,
November 14.

On a petition for leave to prove, and stay the bankrupt's certificate, the Court will, where the circumstances are suspicious, direct a meeting to enable the creditor to prove, and order the Commissioners to review the certificate.

Mr. *Swanston*, in support of the petition, urged that the place of abode of the petitioners being so far distant from the place where the fiat was executed, was a sufficient excuse for their delay, which arose from their perfect ignorance of the nature of the proceedings that had been taken against the bankrupt.

Mr. *Montagu*, *contrà*. I have no affidavit, but shall oppose the present petition without one. If the petitioners had only looked into the Gazette, they would have seen the advertisements of the different meetings of the Commissioners. Was it ever known, that a certificate was stayed, because a creditor who lived in England had not thought proper to read the Gazette? The staying of a certificate has always been considered a case *strictissimi juris*. The only pretence for staying it to enable a creditor to prove his debt, is, where the creditor resides abroad, and has therefore no opportunity of seeing the Gazette,—which was the case in *Ex parte Lord* (a).

(a) 2 Rose, 421.

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Ex parte
BRAY.

The COURT, after inspecting the proceedings under the fiat, observed that only one creditor had proved a debt of sufficient amount to vote in the choice of assignees,—that that creditor had chosen himself sole assignee,—and that that creditor's name was the same as the bankrupt's, *Bridgwood*. Under these circumstances, therefore, it was the duty of the Court not to let the certificate go, unless they were quite sure it was fairly obtained; and they pronounced the following

Order,—That the Commissioners should be directed to hold a meeting for the purpose of enabling the petitioners to prove their debts, the petitioners undertaking to come in under the fiat; and that the Commissioners should be also directed to review their certificate; the petitioners first discontinuing proceedings against the bankrupt in an action now pending against him.

Ex parte SAMUEL BROWN and others.—In the matter of JOHN LLOYD.

Westminster,
November 16.

On a petition by creditors to tax the bills of several solicitors, who had been successively employed by the assignees, the Court made the order as prayed, notwithstanding the bills had been previously taxed by the Commissioners, and paid by the assignees.

THIS was the petition of certain creditors who had proved under the commission, praying that the bills of various solicitors, who had been successively employed by the assignees, might be taxed. The commission issued against the bankrupt on the 18th December

In bankruptcy, the objection of *multifariousness* is not considered as conclusive.

It is an objection to the hearing of a petition, that the affidavits in support of it were sworn before the petition was presented; but the Court will sometimes discountenance such an objection by allowing the petitioner to re-swear his affidavits, and ordering the petition to stand over for that purpose, and also by refusing the costs of the day to the respondent.

1829; and the assignees had employed no less than six different solicitors, who all severally delivered in their bills, which had been taxed by the Commissioners, and paid by the assignees out of the funds of the bankrupt's estate. The petitioners alleged, that several of the bills contained charges for matters of law and equity, which had not been settled by the proper officer of the Court in which such matters had been transacted; and that they were dissatisfied with the taxation of the bills by the Commissioners.

The petition prayed, therefore, that it might be referred to the proper officer to tax these several bills, and that the different solicitors might be ordered to produce before the officer upon oath, all books, papers, and writings in their several custody relating to any of the items or charges in such bills, and to be examined by him touching the same, as he should direct; that the several solicitors might deliver to the assignees upon oath, all deeds, books, papers, and writings, in their custody belonging to the assignees; and that if upon the taxation it should appear that the solicitors were overpaid, they might then be ordered to refund to the assignees such over-payments, and pay the costs of the application.

Mr. *Koe* appeared in support of the petition.

Mr. *Anderdon*, who appeared for Mr. *Harrison*, one of the solicitors employed by the assignees, contended, that the case made out by the petition was not co-extensive with the liabilities of all the solicitors, against whom the application was made. The petition has mixed up Mr. *Harrison* with two other solicitors,

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BROWN
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Messrs. *Law and Coates*, with whom he has not the slightest connection. The petition seeks to tax the bills of the petitioning creditor, and also those incurred by the assignees; but the petitioning creditor is not before the Court. The petition is therefore objectionable, on the ground of multifariousness; for all these different bills were incurred and paid to different persons, and, being wholly distinct from each other, ought not to have been included in one petition. The objection equally applies, whether a petition embraces too many petitioners, or too many respondents. The bills have also been all paid, and unless fraud has been charged, or objectionable items specifically pointed out, no re-taxation ought to take place. [*Erskine*, C. J. That doctrine does not apply here, but only in cases where the party paying is urging the complaint. The petitioners are the complaining parties in this case, and not the assignees who paid the bills.] If that be so, then, the petitioners are proceeding under the 14th section of the Bankrupt Act (a); and as

(a) 6 Geo. 4. c. 16. s. 14. provides, “ that the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the Commissioners shall at the meeting for such choice ascertain such costs, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission; and all bills of fees or disbursements of any solicitor or attorney employed under any commission, for business done after the choice of assignees, shall be settled by the Commissioners, except that so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the Court in which such business shall have been transacted, and the same so settled shall be paid by the assignees to such solicitor or attorney: provided that any creditor who shall have proved to the amount of twenty pounds or upwards, if he be dissatisfied with such settlement by the Commissioners, may have any such costs and bills settled by a Master in Chancery, who shall receive for such settlement, and the certificate thereof, twenty shillings, and no more.”

that section gives no power or direction, in the case of costs paid, to have them refunded, and this Court has therefore no jurisdiction to order a refunding, any order for retaxation would be wholly a nugatory order.

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ERSKINE, C. J.—There is no doubt that the bill of each of these solicitors must be taxed separately. But as the substantial merits of the case of each party would necessarily be before the officer on taxation, the question is, whether the rule as to multifariousness is so inflexible as to compel us to dismiss this petition.

Mr. *Swanston*, who appeared for Messrs. *Brown*, and Messrs. *Law* and *Coates*, and some of the other solicitors, contended, that when a petition was objectionable on the ground of multifariousness, the Court had no discretion but to dismiss the petition. The only question that is ever made, when a point of this kind arises in a Court of Equity, is, in what stage of the proceedings the objection may be taken. The objection itself has always been considered as fatal.

Sir G. ROSE.—In bankruptcy, an objection of multifariousness has never been considered as conclusive.

ERSKINE, C. J.—If there was any rule in bankruptcy, that when an objection of multifariousness is taken to a petition, the Court has no discretion but to dismiss it, we should then, of course, consider ourselves as bound by it. But there appears to be no such rule. And it really seems to me, that the petitioners in this case were actuated by proper motives of consideration towards the respondents, in presenting

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only one petition against them all, instead of a separate petition against each, which would have put them to the expense of six different petitions, and have compelled each party to take separate copies of the affidavits. The question as to our power to order a refunding may be discussed at the proper time, when the result of the re-taxation is known; but it appears to me to come under the general power given by the act, and that there will be no difficulty in procuring that to be refunded, which turns out to have been improperly received. When the bills are taxed by the proper officer of the Court, we can then decide in what proportion the several parties are to pay the costs.

Sir J. CROSS.—The peculiarity of this case is, that the six different solicitors were all successively employed in the same duty. This seems to me to be a sufficient answer to the objection on the ground of multifariousness. In *Ex parte Coles* (a), where such an objection was allowed to prevail, the petition was to expunge several debts, on the ground that some were usurious, and others arising out of gambling transactions. But that case is no authority to show that the Court had no discretion in dealing with the objection. In *Ex parte Saer* (b), a petition was presented by three different creditors to prove three distinct debts; and the Vice-Chancellor did not do more than dismiss the petition, as to two of the creditors, retaining it as to the third. In another case also which occurred in this Court in June last, *Ex parte Watson, in the matter of Neath* (c), which was a petition to stay a certificate and tax a solicitor's bill of costs, the Court, acting upon

(a) Buck, 256.

(b) Mont. & M. 280.

(c) Not yet reported.

the same principle as the Vice-Chancellor, retained the petition as to the certificate, though it dismissed it as to the costs. These cases are authorities to show, that the Court is invested with a discretion on this subject; and in the present instance I think we should not exercise a sound discretion, if we were to entertain the objection of form that has been raised to this petition.

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Ex parte
BROWN
and others.

Mr. *Anderdon* then objected, that the affidavits in support of the petition were sworn *before* the petition was presented, the affidavits having been sworn on the 23d October, and the petition not having been presented until the 2d November. For this reason, he contended, that the affidavits could not be read.

The COURT admitted the validity of this objection; but they gave the petitioners liberty to re-swear the affidavits, and ordered the petition to stand over for a week for that purpose.

Mr. *Anderdon* then applied for the costs of the day, which

The COURT refused.

Mr. *Swanston* not insisting on the last objection, on behalf of his clients, Messrs. *Brown*, and Messrs. *Law and Coates*,

The COURT made the order at once for referring it to Mr. *Gregg* to tax their respective bills.

1833.

Southampton
Buildings,
Dec. 9.

Although the petitioning creditor goes abroad, after issuing a fiat, the Court will not permit another creditor to issue a second fiat, until the time for proceeding in the first has expired.

Ex parte MEDLEY and others.—In the matter of
HAILEY.

A London fiat had issued against the bankrupt in this case, and the petitioning creditor went abroad a week afterwards, without leaving word when he should return. The petitioners stated that it was very material to the interests of the bankrupt's creditors, that a fiat should be immediately prosecuted against him, and that they were prepared to issue another fiat. The object of the present petition was, therefore, that they might be substituted as petitioning creditors, the existing fiat annulled, and a new one issued.

Mr. *Montagu*, for the petitioners, said, there was a probability that the bankrupt would follow the example of the petitioning creditor, and leave the kingdom; and that under such a state of circumstances it was usual to make the order prayed for, subject to a reservation of the rights of the first petitioning creditor.

The COURT said, it was not impossible that the petitioning creditor would return before the time for opening the fiat had expired; and that the petitioners must wait the ordinary period, before they could be permitted to issue a fresh fiat.

Petition dismissed.



1833.

Ex parte TULL.—In the matter of DAVIS.

Southampton
Buildings,
Dec. 9.

THIS was a petition by a creditor residing in North America, for the payment of a dividend. The petition had been signed by an agent on behalf of the petitioner, pursuant to the requisitions of the general order (a), which directs a petition to be signed by the petitioner's agent, when he himself is absent from the kingdom.

An application for security for costs must be made before any step is taken by the party applying.

Mr. *Montagu*, on behalf of the assignees, now applied for an order on the petitioner to give security for costs, as it was doubtful whether any responsibility for costs attached to the agent who had signed the petition; it having been decided in *Ex parte Cadley* (b), that a solicitor attesting a petition was not liable for costs, but that the effect of his attestation was merely a guarantee that the petition was a proper one. At common law, when the plaintiff in a suit is out of the jurisdiction of the Court, he is compellable to give security for costs, if no step in the cause has been previously taken by the defendant; and the rule of practice is the same in Courts of Equity. (c)

Mr. *Stuart*, for the petitioner, admitted that the rule, as stated by the other side, prevailed in actions at law and suits in equity, but contended that there was no authority in bankruptcy for such an application; and even if there was, that in the present case there had been a proceeding already taken by the assignees, who had examined a witness before the Commissioners on

(a) 12 August 1809.

(b) 1 Mont. 352.

(c) See Chit. Eq. Index, tit. "Pr. Costs, security for," p. 913, first edit.

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Ex parte
TULL.

matters connected with the petition ; and had also this very day made an application to the Court to order the registrar to attend with the witness's examination on the hearing of this petition.

ERSKINE, C. J.—Applications for security for costs are not, in general, favoured by the Courts. The application should be made in the first instance, before any step is taken by the party applying. Now, after this petition was presented, the assignees have applied to the Court for an order relating to the subject-matter of the petition; which, together with the previous examination before the Commissioner, forms such a proceeding as amounts to the waiver of any right to security for costs.

The other Judges concurring,

The application was refused.

Southampton
Buildings,
Dec. 10.

Ex parte DAVIS.—In the matter of HAGLEY.

Before a mortgagee, with a power of sale, can apply for leave to bid, he must waive his power of sale, and come before the Court in the simple character of mortgagee.

THIS was the petition of a mortgagee for leave to bid at the sale. It appeared, that in the mortgage deed, there was a power of sale reserved to the mortgagee, and that he had himself put up the premises for sale under this power.

Mr. *G. Richards*, in support of the petition.

Mr. *Stuart* opposed the petition on the part of the assignees.

ERSKINE, C. J.—The application here being by a mortgagee who has a power of sale, he ought to have abandoned his rights under that power, before he presented this petition, which we cannot entertain, except in his simple character of mortgagee. At present, he is standing on his right to sell; but if he chooses to waive that right, and go before the Commissioners in the ordinary way, so as that the assignees may have the conduct of the sale, he may then come to this Court for the usual order (*a*).

1833.

Ex parte
DAVIS.

Sir J. CROSS.—The object of this petition is, that the mortgagee may be both seller and purchaser.

Sir G. ROSE concurring,

The petition was dismissed with costs (*b*).

(*a*) That is, for *leave to bid*; for the mortgage in this case being a *legal* one, the mortgagee would have no other ground for coming to the Court of Review, but must proceed to a sale under the General Order of 8th March 1794.

(*b*) And see *Ex parte Hodson*, 1 G. & J. 12.

Ex parte WILLIAM CLEGG and GEORGE ALEXANDER

BROWN.—In the matter of ALEXANDER DOUGLAS.

Southampton
Buildings,
Dec. 10.

THIS was a petition of creditors who held two acceptances of the bankrupt, claiming to set them off against the amount of an acceptance of their own in the hands of the assignees. The following are the facts:—

Where a creditor has a clear legal right of set-off in an action brought against him by the assignees, the Court will order the action to be stayed, and refer it to the Commissioners to take the account and state the balance.

The petitioners were commission agents at Man-

the Commissioners to take the account and state the balance.

1833.

Ex parte
CLEGG
and another.

chester, and were in the habit of receiving large consignments of goods for sale from one *A. M'Call*, upon which they made advances by accepting bills of exchange drawn by him upon them, in proportion to the amount of such consignments; but as the returns of the proceeds of the sales could not be accomplished within the time these bills had to run, *M'Call* was in the habit of giving to the petitioners, as an additional security, bills drawn by himself upon and accepted by the bankrupt. Previous to February 1833, the petitioners' advances and acceptances in favour of *M'Call* amounted to 1000*l*.

On the 21st February 1833, *M'Call* indorsed to the petitioners a bill for 295*l*. 10*s*. 6*d*., drawn by him upon and accepted by the bankrupt, dated the 14th February 1833, and payable four months after date; which was dishonoured when it became due, and the petitioners were obliged to take up and pay this bill. And on the 23d June 1833, *M'Call* indorsed to the petitioners a similar acceptance of the bankrupt for 350*l*., which fell due on the 25th June 1833, when this was also dishonoured, and the petitioners were obliged to pay it.

On the 8th June 1833, *M'Call* drew a bill upon the petitioners for 200*l*. payable four months after date, which, after being accepted by them, he remitted to the bankrupt.

On the 19th June 1833, a fiat was issued against the bankrupt, when this acceptance of the petitioners remained in his possession, and was taken possession of by his assignees. The petitioners refused to pay it when due, claiming a right of set-off in respect of the bankrupt's two acceptances for 295*l*. 10*s*. 6*d*. and 250*l*.; and the assignees thereupon brought an action against

the petitioners to recover the amount of the 200*l.* bill, which action was still pending.

The petitioners prayed, that they might be declared entitled to set off their acceptance for 200*l.* against the amount of the two bills held by them, and that the assignees might be restrained from proceeding in the action, and might pay the costs of this application.

Mr. *Swanston*, and Mr. *K. Parker*, who appeared in support of the petition, after stating the facts, were stopped by the Court.

Mr. *Twiss*, and Mr. *Rogers*, for the assignees, contended, that if there was any right of set-off in this case, it was only a set-off at law, and was not one that could be claimed under the Bankrupt Act. An injunction to stay proceedings in an action is only granted, where there is an equitable defence, but not a legal one. The only case, where such an injunction was ever granted in bankruptcy, is *Ex parte Minnett* (a); but that was on the ground, that the Commissioners had found a balance to be actually due to the petitioners from the plaintiff in the action. That case, therefore, does not apply to the present one; where the petitioners have the benefit of a valid set-off at law. If they had no legal right of set-off, then there might be some grounds for this application.

ERSKINE, C. J.—There can be no doubt that any party may apply to this Court for relief against any act done by the assignees of a bankrupt, in their character of assignees; and this is the ground on which the

1833.

Ex parte
CLEGG
and another.

(a) 1 Rose, 395.

1833.

Ex parte
CLEGG
and another.

Court interposes in cases of short bills. I think the action in this case was hastily and improvidently brought; and the best plan will be, to stay the proceedings in the action, and to refer it to the Commissioners to take the account between the petitioners and the bankrupt, and ascertain the amount of any balance due. The costs of this petition should be reserved; as it may possibly turn out in the course of the inquiry before the Commissioners, that the assignees were justified in bringing the action; and, on the other hand, it may also turn out that it was improperly brought, and that the assignees ought to pay the costs out of their own pockets.

Sir J. CROSS.—The petition seeks to restrain the assignees from an improvident expenditure of the bankrupt's estate, by proceeding in an action against a defendant, who has a clear right of set-off against them at law. This being so, I think we ought to grant an injunction to stay the proceedings in such action; and I concur in what his Honor has said, as to the question of costs.

Sir G. ROSE.—At law, there can be no question but that these bills may be set off by the petitioners against any demand of the assignees; and therefore to save a useless expense to the creditors, the action pending must be stayed. The proper course is to go before the Commissioners, who will take the account and state the balance, on whichever side it may be. There is nothing here before us but the question of costs; and that will depend upon the result of the inquiry before the Commissioners. We shall then be able to ascertain

what were the motives of the assignees in bringing the action, when they might have called the petitioners before the Commissioners for the purpose of taking the account between the petitioners and the bankrupt, and ascertaining what balance was due from the one to the other.

1833.

Ex parte
CLEGG
and another.

The Order was, that the action should be stayed; that the petition should stand over for the assignees to prosecute the necessary inquiry before the Commissioners, and that the question of costs should be reserved.

Ex parte MORLEY.—In the matter of GOVETT and
LEIGH.

Southampton
Buildings,
Dec. 10.

THIS was a petition for further directions, and to confirm the registrar's report.

There was also another petition in the same matter, excepting to the report; but the other petition stood the first in the paper.

Mr. Twiss, and Mr. G. Richards, who appeared in support of the petition to except, contended that this petition ought to be first heard, as the Court could not confirm the report, without first hearing the exceptions.

A petition to confirm a report stood in the paper before a petition excepting to it. The counsel for the first petition has a right to begin, by stating the facts of his petition, before the counsel for the second petition proceeds to state and argue the exceptions.

Mr. Rolfe, Mr. Anderdon, and Mr. Keene, for the petition to confirm the report, insisted that that ought to have the priority, as it was presented previously to the other, and stood also before it in the paper.

1833.

Ex parte
MORLEY.

The COURT thought, that Mr. *Rolfe* had a right first to state the facts of his petition, if he thought proper, and then that the counsel in support of the other petition should proceed to open and argue the exceptions.

Southampton
Buildings,
Dec. 10.

Although it is the usual and the prudent practice for a mortgagee to apply to the Court for leave to bid, the Court will not rescind the sale, where the mortgagee has purchased the property without such leave, if the purchase has been made by him *bond fide*.

Ex parte EDWARD ASHLEY and JOHN REID.—In the matter of MARK BELL.

THIS was a petition by assignees to rescind the sale of certain mortgaged property of the bankrupt, which had been bought by the mortgagee under the following circumstances, as stated in the petition.

The bankrupt, being seised in fee of certain messuages and lands at Molescroft, in the East Riding of the county of York, on the 20th March 1830 demised them by way of mortgage to *Robert Dixon*, for the term of 1000 years, for securing the repayment of 5000*l.* and interest at 4*l.* and 5*l.* per cent., on the 29th September then next. The commission issued against the bankrupt in December 1830; and the Commissioners found that 5159*l.* 7*s.* 6*d.* was due to *Dixon* for principal and interest on the 29th December 1830, and made the usual order for sale of the mortgaged property. The assignees agreed with *Dixon*, that the fee simple of the mortgaged estate should be put up to sale, instead of the term only, in the hope that a larger price would be thereby obtained for the property; and it was also agreed, that another estate of the bankrupt, in which *Dixon* had no interest, should at the same time be put up to sale. The assignees wished to have a reserved bidding, but *Dixon* would not agree to this; and on the 6th April 1832 the mortgaged premises

were knocked down to *Dixon's* solicitor, who bid for him at the sale, for the sum of 4400*l.*—On the 10th April 1832, the assignees gave notice to *Dixon's* solicitor, that they would not confirm the sale; and on the 1st January 1833, they addressed another notice to *Dixon*, that they would on the 6th July following pay off the principal and interest due to him on the mortgage. The assignees accordingly then tendered him what was so due; but *Dixon* refused to accept it, unless the assignees paid him also the amount of the auctioneer's charge at the sale, and the costs incurred by him in obtaining the order of the Commissioners, as well as his solicitor's charge for attending the sale and entering into the contract of purchase. The assignees declined to comply with this demand; and *Dixon*, since the order for sale, had received part of the rents and profits of the mortgaged premises.

The petition prayed, that the contract of purchase might be rescinded; that it might be referred to the registrar, or one of the Commissioners, to compute interest on the 5000*l.* up to the 6th July 1833, and to add the same to the sum of 5159*l.* 7*s.* 6*d.* already found due by the Commissioners, and also to take an account of all monies received by *Dixon* in respect of the rents and profits, and to deduct the same from the interest on the mortgage; and that upon payment to *Dixon* of the balance, he might be ordered to convey the mortgaged premises to the assignees, for the residue of the mortgage term, and to deliver up all deeds; and that *Dixon* might be ordered to pay all costs incurred by the assignees, by reason of the property being put up to sale, and also the costs of this petition.

1833.

Ex parte
ASHLEY
and another.

1838.

Ex parte
ASHLEY
and another.

Mr. Swanston, and Mr. Bethell, appeared in support of the petition. The mortgagee has in this case voluntarily come in under the commission, by substantiating his claim before the Commissioners for what was due to him on the mortgage, and procuring an order for sale of the mortgaged premises. He has therefore clearly brought himself within the jurisdiction of this Court. The question is, whether a man claiming under a legal mortgage can purchase the mortgaged property, without the sanction of this Court. The principle, on which it is contended he ought not to be permitted to do so, is, that he may not be tempted to commit a fraud, by availing himself of that information, which he has acquired in his character of mortgagee. Then, if the sale is bad for the term, it is also bad for the equity of redemption. Suppose the mortgagee had been in this case invested with a power of sale contained in the mortgage deed; is there any precedent which would have authorized him to buy the property, by selling to himself? (a) And what difference is there in this respect between a power of sale by agreement of the parties, and one by the order of the Commissioners. Would a bill for a specific performance lie by a mortgagee, who purchases the mortgaged property under these circumstances? In *Ex parte Hammond* (b), which was an application of a mortgagee for leave to bid, Mr. Preston, as *amicus curiæ*, stated the general understanding of the profession to be, that it was necessary for a mortgagee to apply to the Court for liberty to bid at the sale; and the Vice-Chancellor made the order accordingly. We rely upon the absence of all precedent on the one side, and the uniformity of pre-

(a) See *Ex parte Davis*, ante, p. 504.

(b) Buck, 464.

cedent on the other, that a mortgagee cannot purchase the mortgaged premises at a sale obtained under his own order, without first applying for leave to do so. The Court of Chancery will never permit an interested party, however little he may have to do with the conduct of the sale, to purchase the property directed to be sold, without first obtaining the leave of the Court for that purpose. The principle is so sacred in the view of that Court, that notwithstanding the purchase of trust property may be advantageous to the *cestui que trust*, yet the Court adheres to the strictness of the rule, and uniformly rescinds a purchase when made by a trustee. The mortgagee in this case, although a co-vendor, refused to consent to a reserved bidding by the assignees, and after leaving the estate thus unprotected, he thinks proper to purchase it himself. The purchase here is not made by a stranger, but by the very person who applies for a sale of the property.

1833.

Ex parte
ASHLEY
and another.

Mr. *Montagu*, and Mr. *Anderdon*, who appeared for the mortgagee, were stopped by the Court.

ERSKINE, C. J.—The *first* question is, in this case, whether the circumstance of the mortgagee, having bid for the mortgaged property at the sale, without having first obtained permission of this Court, is, of itself, sufficient to rescind the contract; and *secondly*, whether, if it does not render the contract invalid, the mortgagee has here been guilty of such improper conduct, as will induce the Court to set aside the purchase. The justice of the case would have been met, I think, if the assignees had acceded to the proposal of the mortgagee, as stated in the petition,—namely, by paying him the costs in-

1833.

Ex parte
ASHLEY
and another.

curring by him at the sale, and then putting up the property again to auction,—unless, indeed, the sale could be considered illegal by reason of the improper conduct of the mortgagee; but it does not appear to me, that any such improper conduct has been practised by him. There are two grounds on which that might be imputed; first, in not having obtained a previous order for leave to bid; and secondly, if there had been any thing in the nature of a fraud practised by him at the sale. Now, what is there here to show, that any thing approaching to a fraud can possibly be charged upon him? He did nothing whatever to lower the value of the property at the sale; nor can I perceive that he has been guilty of any other unfair conduct, or obtained an unfair advantage over any other person who might have been disposed to bid for this property. Then it has been objected to him, that, besides his omission of obtaining leave to bid himself, he refused to consent to a reserved bidding on the part of the assignees; and that he did not bid in his own name, but in the name of another person. But he had not the power to give a reserved bidding to the assignees, and it would have been nugatory in him to have consented to this proceeding, without the order of the Court for that purpose (a). And as to bidding in the name of another person, that is a very common practice at sales by auction, without any imputation of fraud being attached to it.

With respect to the necessity of a mortgagee obtaining leave to bid, it appears from all the books of practice, that though it is usual to procure such an order, yet that it is not absolutely necessary to do so. And the

(a) See *Ex parte Skinner*, 3 Deac. & Ch. 291.

reason of the doubt expressed by the Vice-Chancellor in *Ex parte Hammond* (a) was, because in other proceedings than bankruptcy such an order was not considered necessary. It is clear that, out of bankruptcy, it would not be a valid objection to title, that a mortgagee has become a purchaser. And no principle can be stated as the foundation for the practice in bankruptcy, except what is to be met with in Sir *Edward Sugden's* work on the Law of Vendors and Purchasers, where it is suggested, that a mortgagee could not be both vendor and purchaser, without leave of the Court. But that is not a sufficient ground to induce me to set aside a *bonâ fide* contract for sale; although it might be enough to induce the Court to refuse its assistance, when the mortgagee came here for a specific performance of the contract, by calling on the assignees to convey to him, or by applying for an order to prove for the balance of the mortgage money. The rule, then, if it exists at all, is merely technical, and not substantially operative; otherwise, the Court would not grant an order for a mortgagee to bid at the sale, so very readily as it is the custom to do. In this case, also, it must be remembered, that what was sold was not the property of the mortgagee; it was the fee-simple that he bought, for he himself had only the term; therefore when he bought the fee-simple, the term would merge. Then it has been said, that he should not have refused the offer of the assignees, when they proposed to pay off the mortgage; but this

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and another.

(a) Buck, 464. In this case the Vice-Chancellor said, he doubted the necessity of presenting petitions in cases of this nature; for as it was always competent to a mortgagee to purchase from the mortgagor the equity of redemption, it did not appear to him that the bankruptcy of the mortgagor made any difference in this respect.

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Ex parte
Asuley
and another.

offer was made too late; for the sale was in April 1832, and the assignees did not move in the matter in any way until the January following, during which time the mortgagee had been put to considerable expense. Looking at the whole of the circumstances of the case, therefore, I think we are bound to dismiss this petition.

Sir J. Cross.—I at first imagined, that the objections intended to be urged to this petition, were grounded on our want of jurisdiction; but now it is admitted, that the Court has sufficient jurisdiction to deal with the present question. The assignees in this case complain of an irregularity in the mortgagee having bid at the sale, without having done what is acknowledged to be the usual practice in such cases, namely, obtaining a previous order of this Court for that purpose, and without even giving any notice to the assignees of his intention to bid. The assignees do not seek to set aside the sale, merely because the purchase was made by the mortgagee, but because his conduct was so irregular in deviating from the ordinary practice on those occasions. They say, that he has bought the property in the double character of vendor and vendee, and they offer to pay him all that is due for principal and interest on his mortgage. Now, what was the effect of this irregularity committed by the mortgagee? I do not impute any fraud to him, but the effect of this proceeding is, that he gains an advantage of 700*l*. It does not seem to me consistent with justice, that he should reap so great a benefit from his own irregularity. Then, what is to be done in such a case? In my humble opinion, the mortgagee having been guilty of irregularity in purchasing the property under

these circumstances, the sale to him ought to be set aside; and we should deal to him ample justice, by making an order for the payment of all that is due to him for principal, interest, and costs, in satisfaction of his mortgage.

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Ex parte
ASHLEY
and another.

Sir G. ROSE.—When mortgaged property is sold under an order of the Commissioners, it is not the mortgagee, but the assignees who are the sellers (a). And the practice of mortgagees applying to the Court for leave to bid at the sale, only proves that some doubts existed, which render it prudent for a mortgagee to obtain such an order. But it is no defect in the title of the mortgagee, that he has bid at the sale without this order. If the bankrupt had continued solvent, the mortgagee could clearly have taken a conveyance from him of the equity of redemption, or a release of all his right as mortgagor. If there was such a rule to prevent mortgagees from purchasing, as that which prevents trustees or solicitors, the Court would have acted very unadvisedly in granting orders for leave to bid with so much facility; for they are generally granted as a matter of course. But even supposing it could be shown that the law was otherwise, I should think it far too dangerous a measure to decide now for the first time, on a petition in bankruptcy, against the validity of such a purchase, when the decision might have the effect of shaking so many titles throughout the kingdom. This petition, as it appears to me, is altogether irregular in the relief it prays. The assignees pray the Court to rescind the sale. But are there any cases that furnish an authority for such a

(a) See *Ex parte Smith*, 2 Dea. & Chit. 60.

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and another.

prayer against a mortgagee, under similar circumstances? It does not follow, that the Court would rescind the sale, even were it satisfied that the mortgagee had acted improperly, in purchasing the property without an order of the Court. For whenever the Court does interfere in a matter of this kind, between a trustee and the *cestui que trust* or in the case of an assignee or solicitor, the sale is never set aside in the first instance; but the property is ordered to be resold, and the first purchaser is held to his bargain, unless a better price is obtained at the second sale. This is a strong circumstance against any rescinding of the contract in the present instance. In this case, however, I think it very doubtful whether we could order a re-sale. All the assignees could do would be to rescind the order; but that being *functus officio*, such a proceeding would be nugatory; and the order could not be revived against the mortgagee.

The prayer of the petition, I perceive, is in the alternative, that the contract for purchasing be rescinded, or that the assignees may be let in to redeem. But this Court has no more power to order the redemption of a mortgage, than it has to decide a question of criminal law. If the mortgagee should come here to compel the assignees to convey to him, then indeed it might be a question, whether the circumstance of his having bought the property, without the previous sanction of the Court, could be set up by the assignees as a defence. But the present petition, which amounts to an application that the contract of purchase should be delivered up to the assignees, is clearly not sustainable. If there is such a rule understood in the profession, that a mortgagee, before he purchases the

mortgaged property, should apply for permission of the Court, our decision in this case is not intended to impugn that rule. No doubt, the practice is for a mortgagee to obtain such previous order; and I do not mean to deny the prudence or propriety of this practice. All that is necessary to decide upon this petition is, that the circumstances of the case do not warrant us in rescinding the contract of purchase entered into by the mortgagee, and consequently that this petition must be dismissed.

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ASHLEY
and another.

ERSKINE, C. J.—The proper way of settling this matter would be for the assignees to take back the estate, and pay the mortgagee the amount of the principal, interest, and costs, the costs of this application forming part of those costs.

Petition dismissed—costs reserved.

(a) And see *Ex parte Pedder*, post; *Ex parte Marsh*, 1 Madd. 148; *Ex parte Du Kans*, Buck, 18. But see *Webb v. Rorke*, 2 Sch. & Lef. 661, where Lord Redesdale says, that “the Courts view transactions of this nature between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption, where by the influence of his incumbrance the mortgagee has purchased for less than others would have given, and there were circumstances of misconduct in his obtaining the purchase.” See also 1 Madd. 148, note; *Ex parte Hodgson*, 1 G. & J. 12. As to the costs of the application, see *Ex parte Robinson*, Mont. & M. 261; *Ex parte Say*, 1 Dea. & Chit. 32; *Ex parte Williams*, id. 489.

1833.

Southampton
Buildings,
Dec. 14.

Ex parte WILLIAM FULLER, THOMAS WOOD, and JOHN HELLMANN.—In the matter of THOMAS FULLER the elder, THOMAS FULLER the younger, and WILLIAM FULLER.

A joint and several creditor proves his debt under two separate estates, after which the joint and separate estates are consolidated: Held, that the creditor is nevertheless entitled to retain both his proofs.

THIS was a petition of assignees to expunge a proof, under the following circumstances.

Thomas Fuller the elder, who carried on the business of currier and leather cutter, in 1816 admitted his son, *Thomas Fuller* the younger, as a partner in his business; and they subsequently in 1827 took *William Fuller* into partnership, and they all continued to carry on the business until the 19th of April 1832, when a fiat issued against them, under which they were declared bankrupts. On the 3d August 1832, *Thomas Markwick* proved under the separate estate of *Thomas Fuller* the elder, and also of *Thomas Fuller* the younger, for 1803*l.* 4*s.* (exclusive of interest,) on a joint and several bond dated April 5th 1825, and entered into by *Thomas Fuller* the elder, *Thomas Fuller* the younger, and one *Edwin Hammond Fuller*. It was afterwards ascertained, that the accounts and affairs of the three bankrupts, who had traded under three separate firms, were so confused and complicated, that it was impossible to keep them separate; and an order was accordingly made, on the 10th December 1832, to consolidate the joint and separate estates. On the 19th of April 1833, a dividend of 1*s.* 6*d.* in the pound was declared, and *Thomas Markwick* claimed a dividend upon each of his two proofs of 1803*l.* 4*s.*

Application was afterwards made to the Commissioners to expunge one of these proofs, on the ground

of the two estates being consolidated; but the Commissioners were of opinion, that the case presented such a degree of doubt and difficulty in point of law, as rendered it improper in them to strike out or reduce a debt already admitted to proof; and recommended an application by the assignees to the Court of Review.

The petition accordingly prayed, that one of the proofs might be expunged, and that Mr. *Markwick* might pay the costs.

Mr. *Koe* appeared in support of the petition. If the estates had not been consolidated, Mr. *Markwick*, as the joint and separate creditor of the two bankrupts, would have been entitled to have proved the bond debt against the joint estate of the two, or against the separate estate of each; though he could not, of course, have proved against both the joint and separate estates; *Ex parte Bevan* (a), and *Ex parte Husbands* (b). But after the order made for the consolidation of the estates, he is not entitled to this double proof against the two separate estates: for, each separate estate being now brought into one common fund, he will obtain the same benefit by one proof, as he would have had if the estates had been kept distinct, and his proof had been retained against each estate. The order for the consolidation of the estates is made, on the ground of its being for the benefit of all the creditors; and so long as it remains unrescinded, each creditor must abide by it, and Mr. *Markwick* therefore is entitled to dividends on only one of the proofs for 1803*l.* 4*s.* The plurality of proofs supposes a plurality of estates; and notwith-

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Ex parte
Fuller
and others.

(a) 9 Ves. 223, and 10 Ves. 107, upon appeal.

(b) 2 G. & J. 4; S. C. 5 Mad. 419.


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Ex parte
Fuller
and others.

standing a debt may be secured by a charge on two estates, yet when these estates are consolidated, as there is then but one estate, there is no more reason for doubling the proof than the amount of the charge. The order of consolidation was intended to furnish a more convenient mode of distributing the estates, and ought not to place Mr. *Markwick* in a better situation, than he would have been in if no such order had been made.

Mr. *Swanston*, who appeared to support the proof, was not called on to argue the case.

The COURT thought, that although the order for consolidation had materially altered the fund, yet it was only intended to afford a more convenient mode of administering the assets, and could not affect the rights of parties on their previous proofs. If there had been no consolidation of the estates, dividends would of course have been only paid to Mr. *Markwick* to the amount of one of the sums proved; and it does not follow, therefore, that he will be placed in a better situation by the consolidation of the estates; on the contrary, he may be placed in a worse situation, if many joint creditors come in to avail themselves of the order for consolidation.

Petition dismissed; costs of both parties out of the estate, in consequence of the doubts of the Commissioners.



1833.

Ex parte CHARLES HANCOCK and MARY ANN HANCOCK, Infants, by WILLIAM HANCOCK, their next friend.—In the matter of WILLIAM GILBURD.

Southampton
Buildings,
Dec. 17.

THIS was a petition for leave to enter a claim on the proceedings, under the following circumstances:—

John Gilburd, deceased, by his will left all his property to his wife for life; and after her death he devised the same to his son *William Gilburd*, and the petitioner *William Hancock*, in trust to sell it and divide the proceeds amongst his children. The testator was dead, as well as all his daughters, except the petitioner *Mary Ann*, who had married *Charles Hancock*. In August 1832 the petitioners, by their next friend, filed a bill in Chancery against *William Gilburd* and others, to establish the will; and it being admitted by *William Gilburd* in his answer, that he had the sum of 596*l.* 12*s.* in his hands, it was ordered, in January 1833, that he should pay that sum into the bank, to the account of the plaintiffs in the cause. An attachment subsequently issued against him to enforce his obedience to this order, but he was not taken on the attachment. On the hearing of the cause before the Master of the Rolls in June 1833, a decree was made establishing the will, by which the usual reference to the Master was directed to take the account, and *William Gilburd* was again ordered to pay the 596*l.* 12*s.* into Court.

Where the bankrupt had been ordered to pay a sum into Court in a suit in Chancery against him, pending at the time of his bankruptcy, it was ordered by the Court of Review, that a claim should be entered for that sum on behalf of the plaintiff in the suit, and that the dividends on that sum should be paid into the Court of Chancery, and invested in the name of the Accountant-General.

On the 4th August 1833, a fiat issued against *William Gilburd*; upon which the petitioners, in November 1833, filed a bill of revivor against the assignees, praying that a sufficient sum might be set apart from the funds of the bankrupt's estate, to answer what should

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Ex parte
Hancock
and another.

appear due from him, on taking the accounts directed by the decree. To this bill the assignees had not yet appeared, or put in their answer. A dividend meeting under the fiat being advertised for the 1st February next, the petitioners were apprehensive that the whole of the bankrupt's estate would be then divided among the creditors, unless the assignees were restrained from doing so by the order of this Court.

The petition prayed, therefore, that a claim might be entered by the petitioners for the 506*l.* 12*s.*, without prejudice to their right to proceed with the suit; and that the assignees might be ordered to pay into the Bank of England, to the credit of the Accountant General, in trust in the original cause, or in the matter of this petition, a sum sufficient to pay the dividend upon that sum; and also to set apart a sufficient sum to answer such further demands, upon taking the account directed by the decree, as should appear due from the bankrupt to the petitioners.

Mr. *Swanston*, in support of the petition, referred to the case of *Ex parte Farden* (a), which came before this Court on the 7th June last, and in which a claim was permitted to be entered under similar circumstances. He contended, also, that the costs of this petition should be ordered to be costs in the cause, as was done in *Ex parte Farden*; for that, as the petitioners were brought here by the default of the bankrupt, the costs ought to come either out of the fund administered in equity, or the fund administered in bankruptcy, it being contrary to justice, that the petitioners should bear the costs of this proceeding.

(a) See *ante*, p. 479.

Mr. Bethell, for the assignees, consented to a claim being entered for the 596*l.* 12*s.*, but objected to the application for costs.

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Ex parte
HANECK
and another.

The COURT said, that the assignees in this case were as innocent parties, as the cestui que trusts. Where a party came to ask a favour of the Court, he always paid his own costs, and generally those of other parties in addition, and that the order made as to the costs in *Ex parte Farden* must have been by agreement between the parties.

Ordered, that a claim for the 596*l.* 12*s.* be entered on behalf of the petitioners; and that all dividends on that sum be paid into the Court of Chancery, and invested in the name of the Accountant-General, to the credit of the suit generally. This order to be entered with the Registrar of that Court, if it shall think fit, Each party to pay their own costs.

Ex parte JOHN JONES, Esq. and others,—In the matter of JOHN JONES.

Southampton
Buildings,
Dec. 18 & 19.

THE petitioners were trustees of the *Carmarthen* Savings' Bank, and the object of this petition was, to be permitted to prove a debt of 7564*l.* 3*s.* 9*d.*, which the Commissioners had rejected, under the following circumstances.

The bankrupt, who was an actuary of a savings' bank, had embezzled various sums of money to a large amount, and made false en-

tries and alterations in the cash-books to conceal the deficiency in his accounts; but what were the precise sums embezzled, or on what day they were taken, the trustees of the bank were unable to point out. The Commissioners refused to allow the trustees to prove against the bankrupt's estate, until they prosecuted the bankrupt for embezzlement; upon which they preferred five several indictments against him, but failed in convicting him, through their inability to prove an embezzlement of any specific sum, according to the requisites of the statute. Upon a second application of the trustees to prove, the Commissioners refused to admit their proof for any sums which were not included in the indictments. *Held*, that the trustees, having *bond fide* prosecuted the indictments against the bankrupt, and used their best endeavours to convict him of the felony, were entitled to prove for the whole amount of the sum which the bankrupt had embezzled.

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Ex parte
Jones
and others.

The bankrupt was a grocer at *Carmarthen*, and previous to the issuing of the fiat against him, (which was on the 9th June 1832,) and from the time of the establishment of the savings' bank, he had been employed by the trustees, in the capacity of actuary, and cashier, and large sums of money passed through his hands. Shortly before the fiat issued, the petitioners discovered that the bankrupt had not fully and truly accounted for various sums of money which he had received, and there was found a deficiency of 756*l.* 3*s.* 9*d.*, the amount of the proof which had been tendered by the petitioners. The ordinary course of the bankrupt's employment was, to deposit all monies, which were not invested in government securities, in the bank of Messrs. *Morris* and Sons of *Carmarthen*, who were the bankers of the institution,—reserving in hand so much as might be sufficient for the purposes of paying the monies applied for by the depositors, the expenses and petty disbursements attending the carrying on of the business of the savings' bank, and the salary of the bankrupt. The bankrupt, as actuary and cashier, had the liberty of drawing upon Messrs. *Morris* and Sons for monies in their hands, to be applied by him to any of these purposes; and the monies so drawn he ought to have accounted for, by making proper entries in his cash account with the savings' bank. His duty was to receive all sums paid in by depositors,—to make entries of such sums in the day-book of the bank, to the credit of the depositors, whose accounts were wholly kept by himself in the ledger of the bank,—and to enter the sum total of the several sums received by him in any one day in his cash account. It was also part of his duty, to pay the depositors all money belong-

ing to them which they should apply for, and to make entries of such payments in the day-book, posting the same to the debit of the depositors, and entering the total of monies so paid in one day in his cash account. The bankrupt's custom was to attend once a week, to receive from and pay money to depositors; when a manager of the bank likewise attended, who entered in the manager's check-book all such receipts and payments corresponding with the entries made by the bankrupt in the day-books; and at the close of each day's business the manager subscribed his name at the foot of the several books.

The debit-side of the bankrupt's cash account consisted of the money drawn from the bank of Messrs. *Morris* and Sons, and of monies received from the depositors; and the credit side consisted of monies paid to depositors,—monies paid to Messrs. *Morris* and Sons,—expenses and petty disbursements attending the institution, including his own salary. And the balance between the two sides of this account ought to have shown the true state of the accounts between him and the bank. During the time of the bankrupt's employment as actuary, the books were altogether inaccessible to any other person. On the 22d May 1832, false entries and alterations were discovered in the cash books by a Mr. *Stacy*, who was one of the managers, and the books were immediately handed over to Mr. *George White*, who was thenceforth engaged to fill the bankrupt's situation in the institution. Up to that time the books were, with the exception of the manager's signatures, wholly in the bankrupt's hand-writing; and at that time the books only showed a balance due from the bankrupt of 707*l.* 8*s.* 10*d.* But on subsequently

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going through the whole accounts, a balance of 7564*l.* 3*s.* 9*d.* appeared to be due from the bankrupt; there being several false entries as to payments made by him, and omissions of several sums received by him.

When the proof was tendered to the Commissioners, they refused to admit it, till the bankrupt had been prosecuted for embezzlement; and the petitioners accordingly, at the last summer assizes for Carmarthen, preferred five several indictments against him for embezzling various sums of money. The bankrupt was tried and acquitted on three of the indictments, and, by the recommendation of counsel, and of the Court, the remaining indictments were withdrawn. The petitioners alleged, however, that the indictments were preferred *bonâ fide* with the view of convicting the bankrupt of the embezzlements, and that the best evidence, which the several cases would admit of, was adduced on the trial. The principal difficulties in the way of obtaining a conviction, were these:—It was discovered that the bankrupt had made fraudulent alterations in, and additions to, entries in the day-books and manager's check-books of monies paid out to the various depositors, to the amount of 6051*l.* 19*s.* 1*d.*; and that he had to the same extent, agreeably with such fraudulent alterations and additions, taken credit in his cash account, over and above the sums which, according to the entries in the ledgers, had been actually paid to the depositors. But no part of this sum of 6051*l.* 19*s.* 1*d.* could be shown to consist of any specific sum or sums, in particular, received at any time within the space of six calendar months; and the bankrupt had (excepting in some few instances) accounted in his cash account for all the monies which he

had received on account of the savings' bank. The amount, also, of any three fraudulent alterations and additions comprised in the sum of 6051*l.* 19*s.* 1*d.*, and occurring within a period of six calendar months, were more than counterbalanced by payments, which the bankrupt had actually made within the same period, on account of the savings' bank. It was therefore impossible to support the charge of embezzlement against him, according to the requisites of the statute(a).

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Ex parte
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and others.

On the 11th October 1833, the petitioners being prepared with office copies of the records of the indictments, and certificates of the bankrupt's acquittal, applied to prove under the fiat for the sum of 7564*l.* 3*s.* 9*d.*, the amount of the deficiency found to be due from the bankrupt; but the Commissioners refused to receive evidence as to any sums forming part of the 7564*l.* 3*s.* 9*d.*, which were not included in the indictments, and admitted the petitioners to prove only for the sum of 870*l.*, and that conditionally.

Of the specific sums charged in the indictments, the Commissioners, after having taken evidence in relation

(a) 7 & 8 Geo. 4. c. 29. By the 47th section of which statute it is enacted, that if any clerk or servant, or any person employed for the purpose, or in the capacity of a clerk or servant, shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security, for or in the name, or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed." The punishment for the offence is transportation not exceeding fourteen years, or imprisonment not exceeding three years, with or without whipping. And by section 48, the prosecutor may charge in the indictment, and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts. And see further 2 Dea. Crim. L. 776.

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to them, definitively rejected the sums of 209*l.*, 100*l.*, and 71*l.* 19*s.* 7*d.*

The sum of 209*l.* arose from the fraudulent entry of a sum paid in by a depositor on the 26th November 1828, which was contained in the day-book, and in the manager's check-book. In the day-book it was proved to be in the hand-writing of the bankrupt, but in the manager's check-book the hand-writing could not be proved; and it was doubtful whether it was the bankrupt's, or the manager's for the day. The Commissioners therefore rejected the proof for that sum, as it might have been embezzled by the manager.

The sum of 100*l.* constituted the amount of a fraudulent addition to an entry, made on the 17th June 1829, of a sum paid to a depositor, which was contained in one of the day-books and the manager's check-book; and a like difficulty arising as to the proof of the hand-writing, a similar decision was come to by the Commissioners.

The sum of 71*l.* 19*s.* 7*d.* consisted of a false entry, made in the same books under the date of 28th March 1832, of a sum to that amount, as paid on that day to one of the depositors of the bank; but which had not in fact been paid. The entry in the day-book was by the bankrupt, but that in the manager's check-book was in the hand-writing of Mr. *Philips*, one of the managers at that time. And although evidence was offered to prove that he was imposed upon by the bankrupt, the Commissioners rejected the proof, on the ground that as the manager had in his own hand-writing debited the depositor, the petitioners were concluded by such entry. The bankrupt was then called in and examined as to these parts of the transaction; but on the question being put as to when, and by

whom, the alterations were made, he refused to answer, lest he should thereby criminate himself.

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JONES
and others.

At an adjourned meeting of the Commissioners on the 23d October last, the solicitors to the assignees produced to the Commissioners five several copies of accounts filed by the trustees of the Savings' Bank in the National Debt Office, in order to show the amount of monies received and paid at the bank from and to the depositors in the several years to which the accounts respectively applied. The solicitor for the petitioners objected to the reception of these copies in evidence, on the ground that they were secondary evidence only; and also upon the ground, that the accounts therein comprised purported to be accounts between the trustees of the bank and the depositors, and not accounts as between the trustees and the bankrupt. The objection, however, was overruled by the Commissioners, and the papers were admitted by them as evidence against the petitioners' right of proof. At another adjourned meeting on the 28th October last, the petitioners were required to show that the sum of 870*l.*, which had been conditionally admitted in proof by the Commissioners, was not included in some one or more of the accounts, of which copies had been previously received in evidence by the Commissioners; the Commissioners holding, that in the absence of evidence to this effect, the presumption arose, that such accounts contained full and correct statements of the monies which had been received from and paid to the depositors of the bank,—and that consequently the trustees were thereby *prima facie* concluded from saying that any portion of such monies had not been properly applied or accounted for by the bankrupt. It was

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again objected, on behalf of the petitioners, that such accounts could only operate (if at all) as between the trustees of the bank and the depositors, and were in no respect binding as between the trustees and the bankrupt; and it was also urged to the Commissioners, that it would be impossible to prove by detailed evidence what they required, with reference to the sum of 870*l.*, without at the same time going through evidence in detail as to the different sums comprised in the amount of the debt claimed by the petitioners, and not included in the indictments; which evidence the Commissioners refused to receive, before the petitioners' witnesses had returned home to Carmarthen. The petitioners' solicitor also then produced to the Commissioners a book containing the account between the bankrupt and the savings' bank, by which account it plainly appeared that there was due to the petitioners from the bankrupt, as the actuary of the bank, a balance of 7564*l.* 3*s.* 9*d.*; and the solicitor drew the attention of the Commissioners to the previous examination before them of a Mr. *White*, who had made up the account; but the Commissioners finally decided, that the petitioners had not made out a sufficient case to entitle them to the proof of any debt whatever.

The accounts, stated to have been rendered by the petitioners to the commissioners of the national debt, were made up and stated by the bankrupt from the accounts kept by him, and were afterwards signed by the trustees or managers of the savings' bank, on the application of the bankrupt, before they had any reason to doubt the accuracy of the accounts, or to suspect the fraud or dishonesty of the bankrupt. The petitioners therefore submitted, that the production of copies of

these accounts was not conclusive or binding against them. The petitioners also submitted, that the Commissioners ought not to have required them to give any evidence when, and by whom, the alterations in the books were made; it being unnecessary for the petitioners to do more in support of the proof, than to show the actual balance of the bankrupt's cash account with them as trustees of the bank.

The petitioners therefore prayed, that they might be ordered to stand as creditors of the bankrupt for the sum of 7564*l.* 3*s.* 9*d.*; or that they might be at liberty, at the expense of the bankrupt's estate, to go again before the Commissioners in support of their proof, and that the Commissioners might be ordered to receive evidence of the full amount of the petitioners' claim, without restricting the amount to the sums which the bankrupt stood charged by the indictments with having embezzled; and that the Commissioners might also be ordered to receive evidence in support of the proof, without compelling the petitioners to prove by whom, and when, the alterations in the books were made; and that they might likewise be ordered to admit the proof for such a sum, as should appear upon investigation to be the balance of cash due to the petitioners from the bankrupt; and that the assignees might be ordered to pay the costs of this application.

Mr. *Twiss*, and Mr. *J. Russell*, for the petitioners. The Commissioners seem to have shut their eyes altogether against the principle of the law, as it is laid down in the case of *Stone v. Marsh* (a). In that case *A.*, *B.* and *C.* were proprietors of stock, as trustees, and

(a) 6 Barn. & C. 551.

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C., *D.* and *E.* were partners as bankers. *C.* executed a letter of attorney empowering *D.* and *E.* to sell the stock, and forged the signature of *A.* and *B.* his co-trustees. The stock was sold and transferred into the books of the Bank of England, to the credit of the buyers, and the produce of the stock was paid into the bank of *C.*, *D.* and *E.* *C.* was afterwards tried and convicted of forging a *similar* instrument on other parties, and was executed. Upon an issue directed by the Lord Chancellor, (upon the trial of which issue it was part of the order that no objection was to be taken that *C.* was a co-trustee, and a partner in the banking-house,) it was held, that the money received by the banking-house constituted *a debt* due from the banking-house to the co-trustees, *A.* and *B.*, even although it did not appear that *A.* and *B.* had taken any steps to indict *C.* And the case of *Ex parte Bolland* (a) is to the same effect. The Commissioners here, however, have erroneously thought, that unless the bankrupt was convicted of the fraud, no right to restitution would ensue. But the law, as to restitution, is entirely confined to the case of goods or specific money stolen, and the case of summary restitution in Court. The 21 *Hen.* 8. c. 11. provides, that if a felon hereafter do rob or take away any money, goods, or chattels, from any of the king's subjects, from their person or otherwise, within this realm, and thereof be indicted and found guilty thereof, or otherwise attainted by reason of evidence given by the party so robbed, or the owner of the money, goods, or chattels, or by any other by their procurement, the party so robbed, or the owner, shall be restored to his property by writ of

(a) Mont. & M. 315.

restitution (a). If the petitioners were applying in this case for the mere restitution of goods, they would, of course, have no right to restitution until they had convicted the party. But the present case is very different; for we show an impossibility, quite as strong as was shown in the case of *Stone v. Marsh*, of being able to convict the bankrupt of the felony. We have also indicted the bankrupt, *bonâ fide*, as to part of the debt, and have failed by reason of the difficulties of the case. The rule, that a party injured by a felonious act cannot *sue* the felon, is founded on principles of public policy. The object of it is to secure the punishment of offenders. But if the offender has been already brought to trial, and he has been *bonâ fide* acquitted, and the reasonable improbability of conviction is also shown, the case then does not fall within the reasons on which the rule is founded, according to the well known maxim "*cessante ratione cessat et ipsa lex*." The civil remedy against the felon is not merged in the felony, but is suspended merely until the party has

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(a) The 21 Hen. 8. c. 11., which extended only to a *felonious* taking, is repealed by the 7 & 8 Geo. 4. c. 27. And the law on this subject is now remodelled by 7 & 8 Geo. 4. c. 29. s. 57., which enacts, that if any person guilty of any *felony* or *misdemeanor*, in stealing, taking, obtaining, or converting, or in knowingly receiving any property whatsoever, shall be indicted for any such offence by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representatives. And the Court, before which any person shall be so convicted, shall have power to award, from time to time, writs of restitution for the property, or to order the restitution thereof in a summary way; with the exception, however, of any valuable security *bonâ fide* paid or discharged, or negotiable securities *bonâ fide* transferred, for a just and valuable consideration, without notice or reasonable cause to suspect that the same had by any *felony* or *misdemeanor* been stolen, taken, obtained, or converted. And see further, 2 Deac. Crim. L. 1108.

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been tried for the felony; and if there are two charges of felony precisely parallel in all their circumstances, and the party has been tried on one and acquitted, all that the policy of the law requires is satisfied; and the party aggrieved is not bound to go through the mere form of another expensive mode of proceeding, the event of which must be similar to the first. The case of *Cresby v. Long* (a) (which first established this principle, and has been followed ever since) has laid it down, that if a felon be pardoned after conviction, or even if he be *bonâ fide* acquitted, the owner may bring an action of trespass, or trover, against him to recover damages; for the civil right was not merged in the public injury, but only suspended till the prosecution was concluded.

It is admitted, that if there was any probability of a conviction on an indictment for the felony, the party robbed or defrauded could not bring trover for the restitution of the goods, before he had indicted the wrong-doer. [*Erskine*, C. J. The question is, whether you can make out the claim, without also substantiating the felony.] We submit that we can. The whole transaction may be looked upon, as a mere matter of account between the trustees and the bankrupt. The receipt of the money by him was a rightful act—an act which, by virtue of his appointment, he was entitled to do; and if we prove his receipt, we need go no further than call on him to account. If the bankrupt, indeed, had stolen a watch, the case would then have been different. For there the moment we proved it to be in his possession, we should show a case of felonious taking; our claim against him would be founded in felony, and our civil remedy would be

(a) 12 East, 409.

merged for the time. [*Erskine*, C. J. There the principle of public policy would clearly apply, and I think the distinction you take is correctly drawn.] Then, in the case before the Court, unless we could have shown a distinct receipt of a sum of money, and a fraudulent embezzlement of that identical sum, we could not succeed in the indictment. And the bankrupt, moreover, would, from the state of the books, have been able at once to rebut any charge of embezzlement, by showing payments made by him to a larger amount than the sum which he was indicted for embezzling; so that it comes to nothing more or less, than a case of account. [*Sir G. Rose*. The Commissioners certainly ought not to have refused the admission of the proof, under one general and sweeping objection, that there was felony in the case. All they could have objected to was, that particular items were connected with felonious takings, treating each as a distinct case of larceny.] And it would be morally impossible for us to establish any one of those cases. [*Sir G. Rose*. Again, could the bankrupt plead his own felony in bar to this demand? For it is one thing, whether a claim can be set up founded on a felonious act,—and quite a different one, whether a claim can be rebutted by a party pleading himself a felon.] Such a plea, we submit, would be clearly bad; because, in order to prove it, he would be bound to convict himself, which by the law of the land no man can be called upon to do. In the case of *Stone v. Marsh* (a), which has been already cited, Lord *Tenterden*, in delivering the judgment of the Court, thus expresses himself: “Can the house (the banking firm of *Marsh, Stacy & Co.*) set up this felony

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(a) 6 Barn. & C. 564.

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as an answer to the plaintiff's claim? In general, a man cannot defend himself against a demand, by showing on his part that it arose out of his misconduct, according to the maxim, *Nemo allegans suam turpitudinem est audiendus*. There is indeed another rule of the law of England, viz. that a man shall not be allowed to make a felony the foundation of a civil action,—not that he shall not maintain a civil action, to recover from a third and innocent person that which has been feloniously taken from him,—for this he may do, if there has not been a sale in market overt,—but that he shall not sue the felon; and it may be admitted, that he shall not sue others together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears, by his own showing, to be founded on the felony of the defendant; *Gibson v. Minet* (a). This is the whole extent of the rule. The rule is founded on a principle of public policy; and where the public policy ceases to operate, the rule shall cease also.”—“Now public policy requires that offenders against the law shall be brought to justice; and for that reason, a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for that purpose. But it is not contended that any such policy or rule is applicable to the present case; the offender has suffered the extreme sentence of the law for another offence of the same kind. It does not appear, that the plaintiffs had any knowledge of the particular forgery mentioned in this case, at such time as might have enabled them to bring the

(a) 1 H. Bla. 612.

offender to justice sooner; or even if they had been acquainted with the fact of forgery, that they could, in ignorance of the place of the forgery, and of the means by which the forged instrument was placed in the Bank of England, have instituted a prosecution with success." This judgment of Lord *Tenterden* is decisive of the question now before this Court. We have indicted the offender, and have failed in the indictment upon the merits. [Sir *G. Rose*. In that case, also, there were joint and separate estates to be divided, and it was impossible to support the claim against the joint estate, without arriving at the conclusion of a felony having been committed by one of the partners.]

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The COURT then called upon

Mr. *Swanston*, and Mr. *Chandless*, who appeared for the assignees. By whatever name the bankrupt held his office in this savings' bank, there can be no doubt that he was a clerk in the establishment, and that the relationship of master and servant subsisted. That being so, it follows that the taking of this money constitutes an act of embezzlement, within the meaning of the 7 & 8 Geo. 4. c. 29. s. 46. 47. 48 (a). The subject of the demand of the trustees being wrapped up, as it were, in a felony, cannot be made the object of a civil remedy, until the guilty party has been pro-

(a) See *ante*, p. 529, for the words of the sections 47 and 48. The previous section, viz. the 46th, enacts, that if any clerk or servant shall steal any chattel, money, or valuable security belonging to, or in the possession or power of his master, he is liable to transportation for fourteen years, or not less than seven, or to imprisonment not exceeding three years, with or without whipping.

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Jervis
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secuted for the felony, and public justice is satisfied by his conviction. Whenever a public duty interferes with a private right, the public duty must first be performed; according to the maxim "*quando jus subjecti et jus domini regis insimul concurrent, jus domini regis preferri debet.*" It is said, that the prosecution failed, because the trustees could not prove the precise times when the bankrupt actually took the different sums of money, which were charged to be embezzled by him. But here is an instance to the contrary. On the 26th November 1828, there appears an item of 1299*l.* 16*s.* 3½*d.*, for which the bankrupt took credit, as having paid a sum to that amount out of the bank. Now this statement on the other side is, that this sum was altered from the sum of 299*l.* 16*s.* 3½*d.* by the addition of the figure 1 before the last-mentioned sum, so as to make it appear to be 1299*l.* 16*s.* 3½*d.* Does not this alteration of itself amount to the commission of a felony?

Sir J. Cross.—The mere alteration of the figures is not a felony; you must prove where this 1000*l.* came from, and prove a distinct embezzlement of that identical sum.

ERSKINE, C. J.—The evidence which can be brought forward in this case would not establish a felony, within the terms of the 7 & 8 Geo. 4. c. 29. If you could fix on any particular sum received on a particular day, and show that the bankrupt had not entered such sum in the proper book, or that he had entered it falsely, then there might be sufficient evidence to go before the jury upon the charge of embezzlement. But as it appears from the facts of this case, that all the monies

received on the debtor side of his account are correctly entered, and the falsifications and additions are on the credit side, and there is no evidence to show *when* these alterations took place, nor *when* the money was embezzled, or what sums were misappropriated on a *particular day*, I do not see how an indictment could be supported according to the exigency of the statute. The statute requires proof of the relationship of master and servant between the parties, that the money charged to be embezzled was received on a particular day, and in a certain county, that the bankrupt received the money in the scope of his duty as a servant, and that he afterwards embezzled the identical sum so received by him. To deal with the instance put of the sum of 1299*l*. The bankrupt is charged with having received the 299*l*. in 1828, which was the fact. It is then charged, that the entry of this sum was falsified by him. But *when* was it so falsified? Perhaps in 1830; at which time the whole amount would probably be found to have been fairly paid away by him.

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Sir G. ROSE.—The whole question here seems to be, whether the indictments against the bankrupt were fairly and properly prosecuted, without collusion. I think there is scarcely sufficient to warrant a bare suggestion that they were not so prosecuted. But take it for granted that the bankrupt was not properly indicted, we then get back to the question, how far the assignees can come here and resist a claim against the bankrupt, which is tainted with felony on his part, but which is not created, and did not take its rise, in the act of felony. That would certainly be an abstract question for discussion before us. But let me call

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your attention to this observation as to the case of *Stone v. Marsh*: the result there was in favour of the claim, although the felonious act preceded, and, in fact, created the debt; while here it is quite the reverse, the debt having existed before the commission of the imputed crime. The difficulties are infinitely too great for us to get over, to establish a felony in this case; and I think we are bound to admit the proof. As to the bankrupt's alterations of the entries in the books, that is a mere circumstance as evidence of a felonious intent; it is not in itself a felony; and the circumstance of his absconding is open to the same observations.

Mr. *Swanston*, and Mr. *Chandless*, in continuation. There can be no doubt, that the relation of master and servant subsisted between these parties. There is some difficulty however, we admit, as to proving the precise time when the felony was committed; but all the other difficulties are easily to be surmounted; and therefore a further investigation is requisite by a course of criminal procedure. Another very serious objection to this proof is, that all the bankrupt's accounts appear to have been settled and signed by the trustees, so as to constitute a regular account stated and settled between the parties. This is held to be definitive in a Court of Equity; and it is only by surcharging and falsifying that account, that either party would be permitted to reopen it. But, independently of this last objection, it is submitted that the indictments might have been prosecuted with effect. The sum of 755*l.*, which the bankrupt received from Messrs. *Morris* and Son, but for which he never gave any credit to the institution, forms

a clear act of embezzlement. In the case of *Rex v. Hall*(*a*), a clerk had received six bank notes on his master's account from his master's debtor, in payment of a particular debt, and made a false entry in his master's book, with the fraudulent intent of concealing the payment of that sum, but afterwards paid over to the master the identical notes which he received, applying them in his account to another debt received by him for his master; and he was held to be guilty of a felonious embezzlement, in respect of these six notes.

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Mr. *Twiss*, in reply, was stopped by the Court.

ERSKINE, C. J.—There is no doubt of the correctness of the decision of *Rex v. Hall*, which is nothing more than this, that if the party had once embezzled particular notes, and made the fraudulent entry which was pointed out, his subsequent repentance, evinced by paying those notes to his master (*b*), would not purge his prior felony. There the sum and the date of the embezzlement were certain. But here there is nothing more,—nothing more, at least, that can be proved against the bankrupt,—than an attempt to cover what is alleged to have been a prior embezzlement; his fraudulent alterations being intended to hide some fraudulent takings on a former day; but what those sums were, or on what day they were taken, the assignees, as well as the petitioners, are unable to point out. There is no one

(*a*) 3 Stark. 67.

(*b*) It did not appear in that case, that the notes were paid over to the master, through any feeling of repentance of the clerk, but in his own acquittance of another sum of money which he had received on his master's account. There was therefore in that case, a complete conversion of the notes by the guilty party.

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instance that can be specified, in which the charge of felony could have been established against the bankrupt, on an indictment. The Commissioners originally rejected the proof, because there had been no prosecution. So far they were right. The parties yield to the suggestion, and bring five indictments, in each of which only three instances of embezzlement could be included. To have tried the whole of the alleged acts of embezzlement, at least thirty indictments must have been preferred. Out of the five, however, which were preferred against the bankrupt, three were brought to trial, *bonâ fide*, and without the least imputation of collusion. These three failed, and the remaining two were withdrawn, under the advice of counsel, as hopeless of obtaining a conviction on them. The parties came again before the Commissioners, and they reject the proof of all sums, which were not included in those three indictments. Here, I think, they are certainly wrong; for public justice and public policy were satisfied by what had already been done, though without effect. I am therefore of opinion, that the petitioners are entitled to prove for the whole sum which is found to be due to them from the bankrupt.

Sir J. Cross.—It seems to me, that a fraud of this nature cannot be made too public, in order that it may operate as a caution to the numerous trustees of these institutions; whose funds have been found, by the late return to parliament, to amount in the aggregate to no less a sum than 15,000,000*l*. And this, I am sorry to say, is by no means the first case of embezzlement to a large amount, through the gross negligence of the trustees of savings' banks. With regard to the case before us, I

cannot but remark how dangerous it is for judges to deal with questions of public policy. The getting upon a question of public policy, I remember to have heard compared to getting upon an unruly horse, which too often carries its rider beyond the bounds of discretion. This simile seems not inapplicable to the present case; for the Commissioners, through an over anxiety to do their duty, have carried their views of public policy somewhat beyond the boundaries of reason and of justice. They have excluded a proof, by a very forced construction of a penal act of parliament. In the first place, they have regarded the bankrupt as a servant of the trustees; a relation, which it does not appear to me ever existed between the parties. The bankrupt, as much as the trustees themselves, was an officer of a public institution; he was an actuary of the bank, and not merely acting as a servant to the trustees. The Commissioners, it strikes me, would have done much better, if they had left the criminal part of this case alone. For if they had but looked at a subsequent clause (*a*), in the 7 & 8 Geo. 4. c. 29., they might have treated the bankrupt as an *agent* merely; in which character, the act imputed to him would have been merely a misdemeanor; and in cases of misdemeanor, it is optional (*b*) in the party injured to prosecute the wrong-doer or not.

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(*a*) Section 49; but that section only applies to such agents, as are entrusted with money, or securities, *with any direction in writing to apply the money or the proceeds of the security, for any purpose specified in such directions.* And see 1 Dea. Crim. L. 375.

(*b*) But not, if he seeks to obtain restitution of his property; for the 7 & 8 Geo. 4. c. 29. s. 57. makes it a condition precedent, that the party guilty of the *misdemeanor* shall be indicted and convicted of the offence. See *ante*, p. 535, note (*a*); and see further, 2 Dea. Crim. L. 1108.

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By looking at the question in this point of view, they might have got all the facts out by an examination of the bankrupt, upon an indemnity being given him against any prosecution for the misdemeanor; which could not be done whilst he was treated as a felon. In my opinion, there is nothing here to constitute a proveable felony; we are, therefore, bound to treat the amount of the money, which he has received and not paid over to the trustees, as a mere deficiency in a running account. I observe, also, that there is a provision in the savings' banks act (a), directing security to be taken from persons in the situation which the bankrupt held, by bond to be given by them to the clerk of the peace for the faithful discharge of their duty. The clerk of the peace, or the trustees, therefore, may sue the surety on this bond; so that the legislature clearly contemplated, that a person in the situation of the bankrupt should be personally called upon to account, without imposing the necessity of treating a default of this nature as a felony. But even supposing that the bankrupt had committed a felony, within the meaning of the act,—I cannot conceive that it is the duty of this Court, or of the Commissioners, to examine so minutely through so many pages of accounts, in order to pick out some case of felony. It should be some very fla-

(a) 9 Geo. 4. c. 92. s. 7., which directs that every treasurer, actuary, or cashier, who shall be entrusted with the receipt or custody of money subscribed or deposited, and every officer or other person receiving any salary or allowance for their services from the funds of the bank, shall give good and sufficient security, to be approved of by not less than two trustees and three managers, for the just and faithful execution of his office; such security to be given to the clerk of the peace for the county, or the town clerk respectively, where the institution shall be established; and in case of forfeiture, the trustees or managers are empowered to sue upon the bond in the name of the clerk of the peace, or town clerk.

grant case of felony which would induce us, under circumstances like those of the present case, to reject the proof of a petitioner, until the criminal law had taken its course, for the satisfaction of public policy. The impossibility, however, of supporting the charge of felony against the bankrupt is plainly manifested, by the inability of the counsel for the respondents to point out to us, in this Court, any one instance of embezzlement, in which an indictment for felony could be supported. For these reasons, I agree with his Honor the Chief Judge, that the proof for the whole sum claimed must be admitted.

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JONES
and others

Sir G. ROSE.—I feel myself justified, under the peculiar circumstances of this case, in offering one word of remark, as to the liability of the trustees of this savings' bank. I apprehend, that they will find themselves in a great error, if they suppose that they are not personally responsible to the depositors of the institution for the deficiency of the bankrupt's accounts, arising from their own neglect.

We are not called on in this case to consider, whether the Commissioners did right in directing the indictments for felony to be preferred against the bankrupt in the first instance; because the trustees acceded to the proposition. The trustees have however proceeded to trial, fairly and *bonâ fide*, on three several indictments against the bankrupt. Of this there is no denial. I therefore think the case should go back to the Commissioners, for the purpose of enabling the trustees to prove such sum as they can show to be the amount of the deficiency in the bankrupt's accounts, without any such objection being taken to the proof, as

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the Commissioners have acted upon on the former occasions.

Mr. *Russell* then asked that the costs of the petitioners might come out of the bankrupt's estate. But

The COURT thought there was no reason to depart from the rule established in *Ex parte Fiske (a)*, as this was an appeal from the deliberate judgment of the Commissioners.

The Order was, that the petitioners should not be required to institute any further proceedings against the bankrupt; that, *primâ facie*, the amount found by Mr. *White* to be due from the bankrupt was the amount to be proved, subject however to such deductions as the assignees could establish, to the satisfaction of the Commissioners. And that the petitioners, or such of them as were trustees of the savings' bank at the time of the bankruptcy, should be entitled to make such proof. The assignees to take the costs of the petition out of the estate. But no order was made as to the costs of the petitioners.

(a) Mont. & M. 93. And see *Ex parte Millington*, ante, 298.



1834.

Ex parte CARTER.—In the matter of **CARTER and CARTER.**

*Westminster,
January 11.*

THIS was an application to the Court by way of motion, that the joint certificate of the two bankrupts might be allowed as the separate certificate of one, the other bankrupt having died since the certificate was signed. It appeared, that the creditors who had consented to the certificate were sufficient in number and value, and that they had signed it as the joint certificate of the petitioner and the other bankrupt.

Where two bankrupts under a joint fiat obtain a joint certificate from their creditors, and one of the bankrupts dies before the certificate is allowed, the Court will, on motion, allow it as the separate certificate of the survivor.

Mr. Monro appeared on behalf of the surviving bankrupt, and relied on the case of *Ex parte Cosart (a)*, where a similar course had been pursued.

The COURT granted the motion.

(a) 1 G. & J. 248; and see cases there cited.

Ex parte BEAUMONT.—In the matter of **EDMONSTON.**

*Westminster,
January 21.*

THIS was a petition for the sale of an equitable mortgage, and that one of the assignees might bid at the sale with the view of purchasing the property.

Order refused for an assignee to bid for the bankrupt's property, although the assignee obtained the consent of a meeting of the creditors, such meeting having been only attended by half in value of the creditors.

Mr. Swanston, in support of the petition. The ordinary objection to a petition of this nature, namely, that an assignee, being a trustee, ought not to become a purchaser, is removed in the present instance,—as

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the assignee has obtained the consent of a meeting of creditors. If the creditors, therefore, who are the *cestui que trusts* in this case, conceive the purchase to be beneficial to the estate, there seems to be no reason why the assignee should not have leave to bid for this property. [Sir G. Rose. Has the bankrupt been served?] It does not appear that he has; but it is submitted there is no necessity for serving him. In *Ex parte Bage* (a), which was a case before the Vice-Chancellor, Sir J. Leach was prepared to allow assignees to bid at the sale of the bankrupt's property, provided they obtained the consent of a meeting of creditors. And in another case (b) which occurred before Lord Eldon, the same permission was granted; Lord Eldon stating, that he made the order, in consequence of the sanction given to the application by the approval of the creditors. It is true, that in one case, *Ex parte Hodgson* (c), such an order was refused by Sir J. Leach, but merely because there were no special circumstances, such as the consent of creditors, to warrant him in granting the application. And in *Ex parte Serle* (d), an assignee was allowed to become the purchaser of the bankrupt's effects at a valuation, if upon a reference to the Commissioners it should be found, that the effects might be advantageously sold to him at such valuation.

ERSKINE, C. J.—The order asked by this petition should only be made under very special circumstances. Now, the only foundation for the petition in this case

(a) 4 Madd. 460.

(b) *Anon.* 2 Russ. 350.

(c) 1 G. & J. 14.

(d) *Ibid.* 187.

is, that there has been a meeting of creditors who consented to the order. But perhaps at this meeting not more than a third of the creditors were able to attend. In fact, it appears that only about half in value of the creditors did actually attend, and these ought not to bind those who were absent in a case of this nature.

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Ex parte
BEAUMONT.

Petition dismissed.

Ex parte PEAKE.—In the matter of BICKNELL.

Westminster,
January 22.

THE petition in this matter was answered for Friday next, the 24th instant, but had not yet been served on the proper party. It therefore could not now be served four days before the expiration of the time at which the attendance thereon was required, pursuant to the General Order (a) of the Court.

The Court will not re-answer a petition for a more distant day, because the respondent has not been served four days before his attendance on it is required.

Mr. *White* applied to the Court to re-answer the petition for Tuesday the 28th instant, but reserving the original date of the present answer, in order to save the expense of re-swearing the affidavits, which ought to be sworn *after* the day when the petition purports to be answered.

ERSKINE, C. J.—There is no precedent for such an application. It is not impossible but that indictments for perjury may be preferred against some of the depo-

(a) January 1832. See Vol. 1. Appendix lvii.

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Ex parte
PRAKER.

nents to the affidavits, and therefore it is better to make no alteration in the answer to the petition.

Motion refused.

Ex parte ARTHUR MOWBRAY.—In the matter of
AUBONE SURTEES and others.

Westminster,
January 21.

After an order was made for the distribution of unclaimed dividends, fresh assets came to the hands of the assignees, which enabled them to make a further dividend:—Held, that the further dividend ought to be declared on the debts of all the creditors, including those who had not claimed the former dividends, unless in the interim any of the non-claimants had renewed their proofs,—in which case they must be placed *pari passu* with the other creditors. But the Commissioners ought not, out of the further assets, to lay aside a sum equivalent to the dividends already unclaimed, as a fund in reserve to meet any future renewal of the proofs.

THIS was the petition of a surviving assignee, praying for the distribution of unclaimed dividends.

The commission issued against the bankrupts on the 4th January 1806, who were concerned in two separate banks, one at Newcastle-upon-Tyne, called the Exchange Bank, and the other at Berwick-upon-Tweed, called the Berwick Bank. The amount of debts proved against the Exchange Bank was 353,422*l.* 2*s.* 7*d.*, and the debts proved against the Berwick Bank amounted to 91,744*l.* 13*s.* 11*d.* Three dividends of 5*s.* 5*d.*, 2*s.*, and 10*d.* in the pound had been declared on the debts proved against the Exchange Bank; and three dividends, also, of 1*s.* 3*d.*, 2*s.*, and 10*d.*, on the debts proved against the Berwick Bank. On the 28th February 1826, the assignees filed in the bankrupt office a certificate of the dividends which were then unclaimed by the creditors of both banks; the amount of those unclaimed by the creditors of the Exchange Bank, being 2153*l.* 17*s.* 3*d.*,—and the amount of those unclaimed by the creditors of the Berwick Bank, being

556*l.* 1*s.* 5*d.* After filing this certificate, several creditors of both banks, who had previously omitted to apply for their dividends, were paid part of these respective sums; but there still remained 1716*l.* 19*s.* 9½*d.* unclaimed from the estate of the Exchange Bank, and 550*l.* 9*s.* 5*d.* unclaimed from that of the Berwick Bank. On the 27th April 1832, an order was made for the distribution of these two sums among the other creditors respectively, in proportion to their respective debts; and that the proofs of the creditors, to whom such dividends were originally allotted, should from thenceforth be considered as void as to the same, but renewable as to any future dividends, so as to place them *pari passu* with the other creditors, but not to disturb any dividends previously made. On the 14th September 1832, a meeting of Commissioners was held for the purpose of distributing the unclaimed dividends, and also for the purpose of making a further dividend of the assets then in the hands of the assignees, belonging to both banks, when a dividend of 1*d.* in the pound was declared out of the balance of unclaimed dividends under each estate. And the Commissioners ordered two sums of 1851*l.* 10*s.* 10½*d.*, and 553*l.* 6*s.* 11*d.* to be respectively set aside out of the assets of each estate then in the hands of the assignees, in order to make good the amount of unclaimed dividends to the creditors to whom such dividends respectively belonged, in case they should afterwards appear and claim the same, and also, to answer the subsequent expenses under the commission; and after deducting these two sums from the assets of the two estates, the Commissioners ordered a further dividend of 7*d.* in the pound upon all the debts proved against both estates. But after paying the dividend of

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1*d.* in the pound out of the unclaimed dividends, and that of 7*d.* in the pound out of the further assets of the two banks, there still remained in the hands of the assignee the sum of 2376*l.* 8*s.* 7*d.* as unclaimed dividends on account of the Exchange Bank, over and above the sum of 1851*l.* 10*s.* 10½*d.* so set apart by the Commissioners,—and also the sum of 1018*l.* 9*s.* 7*d.* as unclaimed dividends on account of the Berwick Bank, over and above the sum of 553*l.* 6*s.* 11*d.* which had been also set apart by the Commissioners. These two sums of 2376*l.* 8*s.* 7*d.* and 1018*l.* 9*s.* 7*d.* were the respective amount of dividends remaining unclaimed under each estate on account of the last two dividends of 1*d.* and 7*d.* in the pound.

The petitioner submitted, that the Commissioners put a wrong construction upon the act of parliament, in ordering the two sums of 1851*l.* 10*s.* 10*d.* and 553*l.* 6*s.* 11*d.* to be set apart for the purpose of making good the amount of the unclaimed dividends to those creditors to whom the same belonged, in case they should afterwards apply for them.

The petitioner prayed, therefore, that a meeting of Commissioners might be directed to be called, for the purpose of distributing the two sums of 1851*l.* 10*s.* 10*d.* and 2367*l.* 8*s.* 5*d.* among the other creditors of the Exchange Bank, to the exclusion of those to whom these two sums were respectively allotted; and that the two other sums of 553*l.* 6*s.* 11*d.* and 1018*l.* 9*s.* 7*d.*, so remaining unclaimed as part of the assets of the Berwick Bank, might be also applied in payment of a further dividend, upon the debts proved against the Berwick Bank, to the exclusion of those creditors to whom

these two last-mentioned sums were respectively allotted.

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Mr. *Swanston* appeared in support of the petition. The state of facts existing in this case could never have been contemplated by those who framed the Bankrupt Act; for the distribution of one sum as unclaimed dividends, and the reservation of a sum of the same amount out of another fund, the whole of which ought to have been divided among those creditors, among whom the unclaimed dividends were ordered to be divided, is a complete nullifying of the provisions of the statute. It is in effect precisely the same, as if the Commissioners had not even touched the amount of the unclaimed dividends, which this Court ordered to be divided amongst the other creditors. [*Erskine*, C. J. How can we order the whole of these unclaimed dividends to be distributed, when the new dividend has not been declared three years? Besides, the words of the 110th section of the 6 *Geo.* 4. c. 16. seem to imply, that the creditors, whose previous dividends were unclaimed, may nevertheless afterwards come in, and take advantage of the new dividend. Your petition embraces two facts,—1st, the distribution of the former unclaimed dividends,—and 2dly, the distribution of the new dividends unclaimed; but since the declaration of the last dividend, the period limited by the statute has not yet elapsed.] I should say, that the creditors, who omitted to claim the former dividends, cannot now come in and claim the new dividend. The last part of the order of the Commissioners was equally wrong with the former part; they ought not to have ordered the last dividend to be divided among all the creditors;

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for the proof of the unclaiming creditors is declared by the statute to be void. The 110th section declares, that after the order of the Court for the division of the unclaimed dividends "the proof of the creditors to whom such dividends were allotted shall from thenceforth be considered void as to the same, but renewable as to any future dividends." The Commissioners have therefore reserved a sum in respect of proofs, which the statute has expressly declared to be void; for it only enables the creditor, whose dividends have been unclaimed, to do some act to renew the proofs as to future dividends. [Sir J. Cross. The unclaiming creditor might go on *ad infinitum*, if we were to hold that the statute meant his proof to be renewable every three years.] At any rate, the Commissioners do not seem to have understood the former order of the Court of the 27th April 1882, which directed the amount of the dividends then unclaimed to be distributed among the *other* creditors, and that the proofs of the creditors to whom such dividends were originally allotted should from thenceforth be considered as void as to the same, though renewable as to any future dividends.

ERSKINE, C. J.—It appears to me, as at present advised, that the two sums set apart by the Commissioners, should have been ordered to be divided among *all* the creditors, as well as the remainder of the assets then in the hands of the assignees; and if at the expiration of three years, this new dividend should be unclaimed by any of the creditors, the amount so unclaimed might then, and not until then, become subject to a fresh order for distribution. With respect to the proofs of the unclaiming creditors, it is some-

what doubtful what the statute really intended; whether it meant that the proof should be void only for a time, and renewable afterwards, as well for the former as the future dividends, or void entirely as to the former dividends. It would seem to first view, that the words in the 110th section "void as to the same," meant that the proof should be void as to the *former* dividends only, and renewable only as to the *future* dividends. But then one cannot well get over the subsequent words of the section, "to place them *pari passu* with the other creditors," without saying that the unclaiming creditors may not only come in for any future dividends, but that the renewal of their proofs is to entitle them also to such an interest in the future assets, as will place them on a level with the other creditors, provided this can be done without disturbing any dividends previously made. It is clear, however, that the statute intended the proofs of the unclaiming creditors to be void only as to the former dividends, but renewable as to any future dividends. I think, therefore, that no order can be made for the immediate distribution of the two sums of 2367*l.* 8*s.* 5*d.* and 1018*l.* 9*s.* 7*d.*, but only for the distribution of the two sums of 1851*l.* 10*s.* 10*d.* and 558*l.* 6*s.* 11*d.*, which the Commissioners improperly set apart for the creditors who had omitted to claim the former dividends.

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Sir J. Cross.—This being quite a new question as to the interpretation of the act of parliament, and the statute itself being not only extremely doubtful, but the facts also equally obscure, I have not yet made up my mind so as to form any satisfactory opinion on the subject.

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Sir G. ROSE.—Although the Commissioners may not have adhered in this case to the very words of the statute, yet I am inclined to think that they have, upon the whole, equitably administered the assets. The statute gives a discretionary power to the Lord Chancellor to order the distribution of any unclaimed dividends. The words are, “the Court, if it shall think fit, may, after the same shall have remained unclaimed for the space of three years,” order them to be distributed among the other creditors. We have, therefore, no authority to deal with any dividends which have not been unclaimed for a period of three years; and the last dividend in this case was only declared on the 14th September 1832. With respect to the other point, namely, whether the proofs of the creditors whose dividends were unclaimed, are to be considered as absolutely void, or only void as to those dividends, and renewable as to any future dividend; I think it is clear, as the statute has not in this instance directed the proof to be *expunged*,—which it does direct on other occasions when a proof is improperly admitted,—that it did not intend the proof to be utterly void. The assignees are bound to recognize every party, who has been admitted to prove as a creditor, until his proof is formally expunged from the proceedings. When the act declares that the proof shall be considered as void, it explains how far void, namely, as to the unclaimed dividends, “but renewable as to any future dividends, to place them *pari passu* with the other creditors.” But whether this view of the case be correct, or not, we cannot decide against the right of these parties to renew their proofs and share in the last dividend, as they are not now before the Court. I cannot say, that

the Commissioners have acted improperly on this occasion, and I think we cannot make the order which is prayed for by this petition.

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ERSKINE, C. J.—Upon an attentive consideration of the 110th clause of the 6 Geo. 4. c. 16., which was under discussion yesterday, it appears to me, that neither the Commissioners, nor the petitioner, have taken a correct view of the intention of the legislature. After giving a discretionary power to the Lord Chancellor to order dividends, that had remained unclaimed for three years, to be divided amongst and paid to the other creditors, the clause enacts, “that the proof of the creditors, to whom such dividends were allotted, shall from thenceforth be considered as void as to the same, but renewable as to any future dividends, to place them *pari passu* with the other creditors, but not to disturb any dividends which shall have been previously made.” The Commissioners seem to have considered it to be their duty, on the declaration of any further dividend, to lay aside a sum equivalent to the unclaimed dividends, as a fund in reserve, to meet any future renewal by the non-claimants of their proofs in respect of their unclaimed dividends; the effect of which proceeding would be, to lock up so much of the bankrupt’s effects for an indefinite period, and effectually to defeat the purpose of the legislature. The petitioner, on the other hand, contends, that unless the non-claimants come in to renew their proofs, they are excluded from all share in future, as well as antecedent, dividends,—and that the remaining assets should be divided amongst those creditors only, who had received their former dividends, in the same way as if the proofs

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of the non-claiming creditors had been expunged. This interpretation seems to me inconsistent alike with the object of the legislature, and the language of this branch of the clause. The statute does not declare the proof to be void generally, but void only as to the unclaimed dividends; and if the clause had stopped there, the proof still remaining on the proceedings would, as a matter of course, be included in all dividends afterwards declared. Unless, therefore, the subsequent words necessarily exclude the non-claimants from their share in future dividends, their title to them remains unimpeached. And I am of opinion, that the subsequent words imply no such exclusion. They appear to me to form a saving clause in favour of the non-claimants, by affording them an opportunity of redeeming, by a renewal of their proofs, their interest in the unclaimed dividends, which they had already forfeited by their laches. If this saving clause had stopped at the words "but renewable as to future dividends," it might have afforded some colour for the petitioner's argument; but the words "to place them *pari passu* with the other creditors," explain for what purpose the renewal was to be, and show that the object was to extend and not to restrain their rights, with respect to such future dividends. The Commissioners, therefore, appear to me to have done wrong, in laying aside the sums mentioned in the petition; and the petitioner has also taken a wrong course, in requiring those sums to be divided amongst those creditors only, who have already claimed their former dividends. The true course would be, to divide the money in the ordinary way amongst *all* the creditors, unless, in the interim, any of the non-claimants should renew their proofs, in which case they must be placed *pari passu* with the other creditors.

After an attentive consideration of the clause in question, I think the Commissioners have not taken a correct view of the meaning of the legislature, but the petitioner has no less laboured under a misconception; consequently, there can be no order made on this petition.

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Ex parte COPELAND.—In the matter of **WESTON**.

THIS was the petition of a creditor to remove an assignee, on the ground of poverty, and also for expunging his debt, as well as those of other persons who had proved under the fiat.

Westminster,
Jan. 22.

Mr. Swanston, and **Mr. G. Richards**, who appeared for the assignee, took a preliminary objection, that the petition was multifarious; inasmuch as the petitioner, besides seeking the removal of the assignee, seeks also to expunge the debts of other persons. The prayer of the petition rests upon three distinct allegations: 1. that the assignee is an unfit person, generally, to be an assignee; 2. that he is poor; and, 3. that certain persons have proved improper debts.

Where a sole assignee was in insolvent circumstances, and there was some suspicion attached to the debts of the creditors who elected him, an order was made that he should be restrained from acting as assignee, and that one or more persons should be appointed to act in his name, giving him a proper indemnity.

ERSKINE, C. J.—We have decided that such a petition is not multifarious, when the expunging of the proof is ancillary to the nature of the debt that is proved (a). But although we might not, upon this petition, go into the question of the validity of the debts, in respect of which the creditors have voted in the choice of the assignee who is sought to be removed, and we must therefore take the debts to be valid as long as they remain on the proceedings, yet we can surely in-

(a) See *Ex parte Grazebrook*, 2 Dea. & Chit. 186.

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quire into the circumstances under which the debts were proved, and the relative connection that subsisted between the bankrupt and these creditors, or between them and the assignee.

Sir G. ROSE.—I am of opinion, that the petition is not multifarious, but that the petitioner may go into the general charge of improper debts being proved, as being connected with the choice of assignees, and that the prayer for expunging those debts may be treated as surplusage.

Mr. *Lee* then read the affidavits in support of the petition, which stated the following facts, namely,—that the whole of the goods and furniture of *Rogers*, the assignee, were not worth more than six or seven pounds; that his children were entirely supported by his relations; that a shoemaker refused to give him credit for 1s. 6d. for mending his shoes; and that he was in the habit of being employed by the insolvents in Stafford gaol to make out their schedules, for the purpose of taking the benefit of the insolvent act.

Mr. *Swanston*, and Mr. *G. Richards*, for the assignee. There was never such a thing heard of, as an assignee being removed merely on the ground of his poverty. Such an application is contrary to every principle of equity. A general allegation of poverty is never listened to by the Courts, on applications to remove trustees or receivers; for poverty is a term of very doubtful meaning, and can only be defined by comparison. If the assignee in this case was actually a bankrupt, or an insolvent debtor, then, as the assignee would be necessa-

rily under the control of his own assignee, and would not be a free agent, that might afford some ground for this application. [Sir G. Rose. The whole question is, certainly, whether the assignee may not be removed on the ground of being in insolvent circumstances. In proceedings in equity, although a trustee is not removable, *quâ* bankrupt, or insolvent, yet when he does become insolvent, the Court may entertain the question of appointing a receiver, for the better security of the *cestui que trusts*. Look at the prayer of this petition. It does not seek for the removal of the assignee with costs, but merely for his removal, as not being a fit person, in his present circumstances, to fill the office of assignee. The Court is equally bound to protect the estates of bankrupts, as the Court of Chancery protects any trust estate.] The question is, whether the Court will do so in the present instance, by granting the prayer of this petition. The fiat issued on the 30th July 1833, shortly before which the bankrupt had made an assignment of his effects to the petitioner and a person of the name of *Williams*, and a portion of the property had been removed from the bankrupt's premises by the petitioner. The assignee was chosen in the beginning of September, and it was not until the 16th December, a period of three months, that this petitioner thought of presenting a petition for the removal of the assignee, nor until after an action had been brought against him by the assignee, for the recovery of the property which he had thus taken possession of. The creditors, when they elected this person to be an assignee, were well aware of his pecuniary circumstances, which are in precisely the same state now, as when he was first elected. It is clear, therefore, that this petition for his removal

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is merely presented for the purpose of defeating the action, which he has brought against the petitioner. In equity, a motion for the removal of a receiver must be supported by evidence of misconduct. Now, does it appear that the assignee has committed a breach of trust, or in any way misconducted himself? If there is no charge of this kind against him, and the property of the bankrupt's creditors is not in danger, there is then no cause whatever for removing the assignee, or appointing a receiver.

Mr. *Lee*, in reply, was stopped by the Court.

ERSKINE, C. J.—If our acceding to the prayer of this petition would cast the slightest disgrace upon the assignee, or involve him in the smallest expense, I should hesitate before I consented to any order, which would be attended with either of these results. Or, if the petitioner had refused to give up the property which he took possession of under the assignment made to him by the bankrupt, I should then have been equally unwilling to listen to the present application. But, as both these difficulties are removed, the question is, whether it is not desirable to protect the interests of the creditors, by placing some person to act, either in conjunction with the present assignee, or in his stead. I admit, that poverty alone is not a sufficient reason for the removal of an assignee; nor would it be a stronger ground for his removal, that the creditors electing him had proved improper debts, unless a petition had been presented to expunge such debts, and duly served upon the creditors. Still, if all the creditors who elect an assignee be related to him, and the debts proved by them are

primâ facie of a doubtful nature, that might afford some ground for the removal of an assignee, although the creditors were not served with the petition. Looking, therefore, at all the circumstances of this case, the description of persons who have been permitted to prove debts, and the offer of the petitioner to give up the property he has taken under the assignment previous to the bankruptcy, I think it is for the benefit of the estate, that he should either be removed, or that some other person should be appointed to act with him. This casts no manner of reproach on the assignee; and as to his costs, he can have them out of the estate.

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Sir J. Cross.—With respect to the unfitness of *Rogers* to be continued sole assignee in this case, I have long entertained an opinion, that it is, of itself, a suspicious circumstance, to elect any person to be the *sole* assignee of a bankrupt's estate. And here there is reasonable ground of strong suspicion, at least, that this assignee is not the safest person to discharge the duties of the office. It has been stated, that, two years ago, he owed two years' rent, which was only 9*l.* a year, and which does not appear to be yet discharged; that the whole of his furniture does not amount in value to 7*l.*; and that he has been frequently summoned for small debts. None of these statements have been contradicted, and therefore we must take them to be true. There is then not only evidence that he is poor, but that he is actually now in insolvent circumstances. The petitioner, therefore, when he was called upon by this assignee to refund property of the bankrupt's in his possession, might well decline doing so, until another assignee had been appointed. It has been said, that *Rogers* had no

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wish to be assignee, and that he was elected without any solicitation on his part. But does it not appear strange, that a man elected an assignee against his will should come here, at a great expense, to insist upon holding the office, which he says was imposed on him? In whatever way we deal with this petition, *Rogers* ought certainly not to be continued as sole assignee of this bankrupt's estate.

Sir G. ROSE.—Although there may not be sufficient grounds for the removal of the assignee in this case, is it possible for any one to contend, that this person ought to be left with the sole and entire control of the bankrupt's property? The question is, whether, if the Court is satisfied that the assignee is in insolvent circumstances, it may not appoint some person to act as a co-assignee, in the nature of a receiver. And this altogether appears to me to be the best mode we can adopt, for the interests of all parties concerned under this petition.

Ordered, that the petitioner, by his counsel, undertaking to give up the property for which the action was depending, or the proceeds, to such person as the Commissioners should appoint, *Rogers* should be restrained from acting as assignee in the matter in the petition mentioned, until further order; and that the Commissioners should meet for the purpose of appointing one or more persons to act as an assignee, or assignees, using the name of *Rogers*, and indemnifying him; with the usual directions. That the costs of the action should be reserved until after

such appointment, with liberty to any person to apply. And that the costs of this petition, and of the meeting hereby directed, should be paid out of the estate, except the costs of other persons than *Rogers*, who may have been served with this petition, which were directed to be borne by the petitioner.

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Ex parte
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In the matter of LEVETT.

Westminster,
Jan. 22.

IN this case the fiat, with the adjudication and other proceedings, were sent in a parcel by the mail, and the parcel containing them was either stolen or lost. The fiat was issued on the 6th January instant, and the adjudication was on the 14th of the same month; under these circumstances, the Commissioners having declined to proceed with the execution of the fiat,

Where a fiat is lost, and a party does not choose to rely on secondary evidence of its existence, the proper course is to issue a fresh fiat, and not a duplicate fiat.

Mr. *Swanston* applied to the Court to order a duplicate fiat to be issued. [*Erskine*, C. J. Would not a renewed fiat answer every purpose?] That supposes the existence of the original fiat, which at some future time might be required to be proved; and it is desirable to prevent, if we can, the necessity of furnishing such evidence of the original fiat. [*Sir G. Rose*. Ought you not to apply to the Lord Chancellor?] Any order made here would be confirmed, as a matter of course, by the Lord Chancellor.

Sir G. ROSE.—I never yet heard of a duplicate commission, or a duplicate fiat. If you do not like to rely

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on secondary evidence of the existence of the former fiat, a new fiat appears to be the proper course.

The rest of the Court concurring,

The motion was refused.

Westminster,
Jan. 23.

Ex parte SAUNDERS.—In the matter of SAUNDERS.

By the terms of the bankrupt's marriage settlement, the wife's property was settled upon her, in case of the bankrupt's death, or the parties being divorced, but the bankrupt was entitled to the interest for his life; and in case he survived his wife, he was to have a certain share of this property. HELD, that the wife might, in the name of her trustee, make such proof as the Commissioners might think she was entitled to.

THIS was a petition of the bankrupt's wife, praying that some person might be permitted to prove a sum of money, as trustee for the wife, to which she was entitled under the provisions of her marriage settlement. At the time of their marriage, the bankrupt and his wife were residing at the Mauritius; and by the terms of the marriage settlement, the money in question, which was the property of the wife, was to be paid to her, in case of the death of the husband, or of the parties being divorced; and in case the husband survived the wife, then he was to have a certain share of the wife's property; but during the continuance of the marriage, he was entitled to the interest for his life. It was therefore proposed by the petition, that a Mr. Lunny, a relative of the wife, should be permitted, as trustee, to prove the sum to which she was entitled; the only question being, as to the mode of making the proof.

Mr. J. Russell, in support of the petition.

Mr. L. Wigram, for the assignees. The only event, in which the husband was to repay this money, being on

the dissolution of the marriage by his death, or by divorce, the wife has therefore only a right to claim the sum in question, when the marriage may be so dissolved. In *Ex parte Shute* (a),—where a bankrupt had, on his marriage, entered into a bond to trustees to pay them 1200*l.*, upon trust for himself for life, if he should not become a bankrupt, with remainder to his intended wife for life, with the usual limitations to children,—and on the faith of the bond, he was permitted to apply to his own use his wife's marriage portion, amounting to 150*l.*,—it was held, that the trustees were entitled to prove for the 1200*l.*, and the dividends were directed to be invested in stock, the dividend of which was to be subject to the payment of interest to the wife on the 150*l.*; but the remainder was ordered to be paid to the bankrupt's creditors for his life.

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The COURT observed that, in the case cited, the property secured by the bond was the husband's, and did not come to him from his wife; that a bankrupt's wife was in all cases entitled to have her interests taken care of, and that the present case came within the principle of *Ex parte Turpin* (b).

Ordered, that the petitioner might go before the Commissioners, and in the name of *Lunny*, as her trustee, make such proof as the Commissioners might think she was entitled to; and that the dividends on such proof, and the interest thereof, should accumulate for the benefit of the wife.

(a) 3 Dea. & Chit. 1; Mont. & B. 385.

(b) 1 Dea. & Chit. 120.

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Westminster,
Jan. 23, 24, &
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Ex parte JOHN TIPLADY and others.—In the matter of
WILLIAM DICKENSON.

The Court of Review has jurisdiction to entertain a petition against the allowance made by the Commissioner to the official assignee.

But the Court will not review the decision of the Commissioner, as to the quantum of the allowance, unless it appears that he has proceeded on an erroneous principle. *Dissent.*
Sir J. Cross.

THIS was a petition of the assignees, and nearly all the creditors who had proved under the fiat, praying that the Court would reduce the allowance, which the Commissioners had made to the official assignee. The petition stated the following facts.

The bankrupt had been engaged in the business of a factor until the issuing of the fiat against him, which was on the 12th February 1833. The debts proved by the creditors in London did not exceed 21,230*l.*, and the debts proved by the petitioners amounted to 20,873*l.* 16*s.* 3*d.* At the time of the bankruptcy, the property of *Dickenson* consisted of cash and bills in his possession, to the amount of 714*l.* 8*s.* 2*d.*; of stock in trade to the amount of 10,567*l.* 7*s.*; of a lease and fixtures of a house in Milk Street, worth about 1500*l.*; of certain mining shares, worth about 800*l.*; and sundry debts, considered good, to the amount of 7015*l.* Upon the appointment of the official assignee, which took place on the 19th February 1833, the sum of 714*l.* 8*s.* 2*d.* in cash and bills was immediately paid over to him. The bankrupt's stock was shortly afterwards sold by the creditors' assignees for 10,567*l.* 7*s.*, which sum was paid to *Edwards*, the official assignee, by six different checks on London bankers, the last payment being made on the 1st June 1833. The lease and fixtures were sold for 1474*l.* 3*s.* 6*d.*, which sum was also paid to *Edwards* by a banker's check, on the 30th May 1833. The mining shares were sold for 850*l.*, and certain other effects for 16*l.* 19*s.*, and the amount was

also paid to *Edwards* by a banker's check. Between the 19th February and the 18th June, *Edwards* received sundry debts and other sums of money on account of the bankrupt's estate, amounting to 4627*l.* 11*s.* 6*d.* This was the whole amount produced in cash from the property of the bankrupt, up to the 18th June 1833, being altogether 18,250*l.* 9*s.* 2*d.* Out of the sum of 850*l.* received for the mining shares, *Edwards* paid 574*l.* 0*s.* 4*d.*, for which the shares were pledged by the bankrupt before his bankruptcy; but he charged a commission to the bankrupt's estate upon the whole of the 850*l.* The petitioners alleged, that such of the book debts due to the bankrupt, as required any trouble and exertion in collecting, were still outstanding, and were not received by *Edwards* up to the 18th of June 1833.

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and others.

On the 18th June 1833, a dividend was declared, when *Edwards* made the following charge against the bankrupt's estate.

	£	s.	d.
Examining books and accounts	10	10	0
On collection of debts under 100 <i>l.</i> 5 per cent.			
on 4412 <i>l.</i> 5 <i>s.</i> 3 <i>d.</i> received in cash	220	12	2
Ditto above 100 <i>l.</i> and not exceeding 500 <i>l.</i> 2½			
per cent. on 387 <i>l.</i> 19 <i>s.</i> 9 <i>d.</i>	8	9	0
Ditto on other debts, 1 per cent. on first 1000 <i>l.</i>	10	10	0
Half per cent. above, on 12,500 <i>l.</i> 3 <i>s.</i> 2 <i>d.</i>	62	10	0
On money divided, 2 per cent. on first 1000 <i>l.</i>	20	0	0
One per cent. above, on 14,914 <i>l.</i> 10 <i>s.</i> 7 <i>d.</i>	149	3	0
On number of creditors who proved, 1 <i>s.</i> each,			
153	7	13	0
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	£489	7	2
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This sum of 489*l.* 7*s.* 2*d.* was exclusive of the sum of 98*l.* 10*s.* 3*d.*, which was paid to the auctioneers and accountants for their services in disposing of the stock,

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and also of the sum of 99*l.* 7*s.* 10*d.* paid out of the estate for fees and compensation fund, and of 10*l.* 7*s.* 6*d.* for petty charges. The assignees objected to the allowance of this sum to the official assignee, but the Commissioner allowed nearly the whole of it, namely, 488*l.* 17*s.* 2*d.*

The prayer was, therefore, that this sum might not be allowed to the official assignee, but only such other less sum as to the Court might seem proper, and that the costs of, and incidental to the application, might be paid out of the estate.

In answer to this petition, the official assignee made an affidavit to the following effect. That there were 403 parties or firms indebted to the estate of the bankrupt in various sums at the time of the issuing of the fiat, of which debts 343 were paid before the 18th June, in consequence of the great exertions used by the official assignee. That with the view of collecting as much as possible before the 18th June, he made in many instances special applications to the different parties, particularly requesting payment, in order that the amount applied for might be included in the dividend; and that had it not been for these exertions, a comparatively small number and amount of the debts would have been collected previous to the dividend meeting. In addition to the 343 applications which were successful, he applied also to 58 other persons, but without success. Besides the collection of the debts, the deponent stated that there were various other duties of an extensive nature, which devolved upon him as official assignee, namely, the examination of the bankrupt's books and accounts, and of his balance sheet,—the examination and adjustment of the creditors' accounts, previously

to the proof of their debts, and subsequently on payment of their dividends,—the making proper inquiries, and taking proper steps, with a view to the expunging and reducing of proofs, where he discovered, or had reason to believe, that the creditors had received monies from other sources connected with the bills and securities exhibited, or that for any other reason the proof made was greater than it ought to have been,—also, the examination and payment of all claims for wages, allowance to the bankrupt, rents, taxes, rates, insurance upon property belonging to the estate, carriage of goods, and all other charges incidental to the working of the estate.

With respect to the sum of 488*l.* 17*s.* 2*d.* allowed to the official assignee, he stated, that the different items composing that sum, were fixed and calculated by the Commissioner himself, and by his direction copied in the margin of the accounts of the assignees previously to the accounts being sworn to, and passed by the Commissioner; and that such allowance was made by the Commissioner, after frequent meetings had been held by the Commissioners of the Court of Bankruptcy, to consider and determine the principle of making allowances to official assignees, having regard to the nature of their duties, and to the amount of the respective estates to be administered. That out of the allowance so made to him, he had to pay the rent of his offices, clerks' salaries, and all other charges connected with the establishment of an office where extensive business was conducted.

It was further stated in the affidavit, that on the 19th April the official assignee paid 574*l.* 14*s.* 4*d.* by a check on his private bankers, to redeem the mining

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shares which had been pledged, and on the same day received 850%, being the produce of the sale of these shares. That the mode of redeeming this property was highly advantageous to the estate, in having rendered an application to this Court unnecessary on the part of the equitable mortgagee for an order of sale, and all subsequent proceedings consequent on such order, whereby a great expense was saved to the estate. That the bankrupt, previous to the fiat, offered only a composition of 7s. 6d. in the pound, in satisfaction of his debts, and that there had already been paid to the creditors who had proved, a dividend of 9s. in the pound.

In addition to this affidavit of the official assignee, it was also sworn by two other official assignees, that prior to their appointment, as official assignees, they had been for many years almost exclusively employed as public accountants, and had extensive employment and experience in the collection of debts due to bankrupts' estates, and the examination of bankrupts' accounts, and other business necessarily attending the winding up of bankrupts' affairs. That they were generally allowed by the Commissioners, acting before the foundation of the present Bankruptcy Court, any rate of commission for the collection of debts satisfactory and agreed to by the assignees who employed them, varying according to the amount and character of the debts collected, besides an extra sum, which constituted the principal profit of the accountant, for time occupied by their clerks, of themselves in the examination and preparation of the bankrupt's accounts, and other accounts and transactions relating to his estate, as also for their attendance upon the Commis-

sioners, assignees, solicitors, debtors, and creditors of the bankrupt's estate, and for the examination, adjustment, or payment of the various demands thereupon, and for other general business which arose in the working of the bankrupt's estate. That if the estate of this bankrupt had been administered in the manner adopted before the establishment of the present Court of Bankruptcy, and either of the deponents had been employed, as accountants, to collect the debts, and to conduct the general business, they should have expected a commission of five per cent. for the collection of the debts alone, independent of their charges for all other business, to which their time and attention would necessarily have been required; and that they verily believed, from their experience in bankruptcy proceedings, that such charges would have exceeded the sum of 488*l.* 17*s.* 2*d.*, awarded to the official assignees; and that the assets of the bankrupt could not have been got in under the old system, either in respect to the proportional amount of assets realized, or in respect to the time within which the same had been gotten in.

In reply to these affidavits, it was sworn by *Tiplady*, one of the creditors' assignees, that he applied to Mr. *Parrinton* and Mr. *Threlkeld*, two persons who had been for many years most extensively engaged in the business of public accountants, and in the management and winding up of the estates of bankrupts in the line of business carried on by *Dickenson*, and inquired of them the particulars of their charges of managing and winding up of bankrupt's estates, and was informed by each of them, that if he had been employed in winding up the bankrupt's affairs, and had been left to make his

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own charge for so doing, by way of per centage, on the amount of book debts received, he would have considered that a commission of $2\frac{1}{2}$ per cent. on the amount received for the book debts, in addition to $\frac{1}{2}$ per cent. for the arrangement and sale of stock, would have been a full and fair remuneration for all the business to which his time and attention would necessarily have been required, so far as he could form an opinion, including the examination of the bankrupt's books and accounts, the examination of his balance sheet, the examination and adjustment of the creditors' claims, and all the other business specified in the affidavit of the official assignee; and that he had never received so much as 488*l.* under any bankruptcy or insolvency. That Mr. *Threlkeld* had the management and winding up of the bankruptcy of Messrs. *Wilson* and *Lilliman*, under which he collected debts to the amount of 10,000*l.* and upwards, and sold stock to the amount of 8000*l.* and upwards, with the assistance of one of the bankrupts, in small parcels; that up to the first dividend the sum of 10,000*l.* and upwards was divided among the creditors; and that for all these services he charged 1*l.* per cent. and no more, on the produce of the stock and debts; which commission amounted to 193*l.* 15*s.* 10*d.*; but in addition to this, the assignees and creditors, in consideration of his extraordinary exertions, gave him a further sum of 52*l.* 10*s.*, making together 246*l.*; and that at the second dividend a sum of 3000*l.* was divided among the creditors, when his further charge amounted to 39*l.* 1*s.* 6*d.*, and no more. That it was the deponent, and not the official assignee, in the present instance, who arranged for the redemption and sale of the mining shares; that he got from the official

assignee his cheque for 574*l.* 0*s.* 4*d.*, which was immediately paid to the mortgagees of such shares, and within an hour afterwards he paid to the official assignee the sum of 850*l.*, for which the deponent sold the shares; and that at the time the official assignee signed the cheque for the 574*l.* 0*s.* 4*d.*, he had money in his hands to that amount belonging to the estate.

It was also sworn by a person who had been for several years clerk to the bankrupt, and for some time his partner, that, upon the failure of *Dickenson*, the deponent made up his books and accounts, and also his balance sheet, and examined and adjusted all the creditors' accounts; and that he likewise formed a separate book containing the particulars and amount of the debts, and attended with the official assignee at the first meeting for proof of debts, when this book was referred to by the official assignee of the deponent, as a check upon the amount of the debts which the creditors attended to prove; and that he was paid by the assignees 15*l.* for his services.

The Commissioner, who had made the allowance to the official assignee, although informed that a petition had been presented to reduce such allowance, made nevertheless the following certificate.

“ In the matter of *William Dickenson*, a bankrupt.

“ I hereby certify, that under and by virtue of the judicial discretion vested in me by the act of parliament in that behalf, I ordered to be paid out of the bankrupt's estate, to the official assignee thereof, the sum of 488*l.* 17*s.* 2*d.*, as a remuneration for his services, such sum of money appearing to me, upon consideration of

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the bankrupt's property, and the nature of the duties of the official assignee, to be just and reasonable.

EDWARD HOLROYD."

Mr. *Twiss*, and Mr. *Montagu*, appeared in support of the petition. The judgment of the Court on this question is looked forward to with no small degree of anxiety by the commercial world; for if the Court should sanction so unreasonable an allowance as this to the official assignee, it is the opinion of many mercantile men, that it will prove a serious obstacle to the administration of a trader's effects under a fiat in bankruptcy. They think, that so large a remuneration to the official assignee will operate most injuriously to the interests of a bankrupt's creditors; and will prevent many large estates from being distributed under the bankrupt law, as they would be, if they were not liable to so ruinous a deduction from the bankrupt's property. In this case, there were only 103 days of actual work performed by the official assignee, and all that work has been to receive money, without any adequate trouble, compared with the extent of his remuneration. The sum of 488*l.* 17*s.* 2*d.*, also, which the Commissioner has allowed him, is over and above all his charges for expenses; and the creditors now submit to the Court, that such an allowance is an exorbitant one, and ought to be diminished.

There are two questions, however, which will naturally present themselves to the consideration of the Court; 1st, whether the Court has jurisdiction to reduce the allowance? and 2dly, whether this is a proper case for the interference of the Court?

First, in regard to the jurisdiction. The 1 & 2 Will. 4. c. 56. s. 22. enacts, that the official assignees are "to be subject to such rules, to be selected for such estate, and to act in such manner," as the chief and other judges of the Bankrupt Court, with the consent of the Lord Chancellor, shall from time to time direct. By section 57, also, it is declared, "that it shall be lawful for the Commissioner, before whom any person shall be adjudged a bankrupt in the said Court of Bankruptcy, or who shall appoint an official assignee under the power hereinbefore given for that purpose, to order and allow to be paid out of the bankrupt's estate to the official assignee thereof, as a remuneration for his services, such sum of money as shall appear to such Commissioner, upon consideration of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable." Now, the power given to this Court by the 22d section was thus exercised. Among the Rules or General Orders of this Court, which it made on its first establishment, with the consent of the Lord Chancellor, it is, by Rule 27 (a), "recommended to the Commissioners to allow the official assignees one per cent. on the monies they respectively receive, and one and an half more on the monies actually to be divided, subject nevertheless to be increased or diminished in any case under special circumstances, to be referred to the Court of Review." It is clear then, that the statute not only gave jurisdiction to this Court to decide upon the proper allowance to the official assignee, but that the Court acted upon such jurisdiction; otherwise, it

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(a) See General Orders of January 12, 1822, Vol. 1, Appendix, xxviii.

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would not have made any such order as this. [Sir *J. Cross*. I observe, that by one of the preceding rules (a) it is directed, "that each official assignee shall follow the instructions of the Commissioner under whom he acts, according to the exigencies of each particular case, subject to such directions as shall from time to time be prescribed by the Court of Review."] In a case which has already occurred before this Court, *Ex parte Ellis* (b), where the appointment of an official assignee was objected to, on the ground that he would receive 300*l.*, without having any thing to do,—the Court never thought of disclaiming any jurisdiction over the Commissioner in the appointment of the official assignee, but merely said, "it is a mistake to suppose that if he has nothing to do, he will receive 300*l.*;" which shows plainly, that the Court thought the reward of the official assignee ought to be in proportion to his services. There can be no doubt that this Court possesses all the jurisdiction, as to controlling the acts of every person connected with a commission or fiat of bankruptcy, which was formerly exercised by the Lord Chancellor, and would be still exercised by him, if this Court had not been established. In *Ex parte Candy* (c), it was made a question, whether the discretionary power of the Commissioners to reject a person as unfit to be an assignee, was subject to any appeal to the Lord Chancellor; and the Vice-Chancellor in giving judgment, which was confirmed on appeal to the Lord Chancellor, thus expressed himself: "Upon the question, whether the Court has jurisdiction to interfere, I

(a) Rule 25, Vol. 1, Appendix, xxvii.

(b) 1 Deac. & Chit. 209; 1 Mont. & B. 116.

(c) Mont. & M. 197.

entertain no doubt whatever; because I apprehend, that it is inherent in the jurisdiction of the great seal to superintend the acts of every person connected with the commission, except where the legislature has otherwise directed. The jurisdiction to remove assignees prior to the late act (a) was always exercised, without there being any express authority given by statute, because it was considered to be inherent in the jurisdiction of the great seal."

The *second* question is, whether, if this Court has jurisdiction to interfere, this is not a case which calls for such interference. In making the allowance to the official assignee on the present occasion, the Commissioner seems to have proceeded upon some general rule of computation, which he was not justified in doing by the provisions of the act. For by the 57th section already referred to, he is authorized to make the allowance, upon consideration of the amount of the bankrupt's property, and the nature of the duties to be performed by the official assignee. Now, the true interpretation of this section is expressed by the Court in *Ex parte Ellis* (b),—where it said that it was a mistake to suppose that the official assignee was to be remunerated for doing nothing—as well as in the language of its own rule (c), which provides for the increase or diminution of the allowance to the official assignee, according to circumstances. Then what are those circumstances in the present case? The Commissioner has awarded the sum of 488*l.* to the official assignee, merely for collecting in the bankrupt's debts, and receiving payment of a few bankers' checks. And

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(a) 6 Geo. 4. c. 16.

(b) *Suprà.*(c) Rule 27, *suprà.*

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besides this sum of 488*l.*, no less a sum than 98*l.* has been paid out of the estate for the charges of auctioneers and accountants, and 99*l.* for fees, which is nearly double what would have been payable under the old system in bankruptcy. The official assignee having been appointed on the 19th February, and his remuneration being for his services up to the 18th June, the number of days he was employed about the bankrupt's concerns was 119; he has therefore been allowed by the Commissioner at the rate of more than 4*l.* a day for the simple labour of receiving money, and this too in addition to what he was receiving as official assignee under other bankruptcies. It is incumbent on the Court, then, to prevent so wasteful an expenditure of the bankrupt's property, which will otherwise compel the creditors of an insolvent trader to have recourse in future to a trust deed, instead of a fiat in bankruptcy, for the distribution of his effects.

Sir G. ROSE.—There is no doubt that this Court has a general jurisdiction to control the proceedings of the Commissioners, where it is expedient to exercise such control. There may be some few exceptions to the contrary, as in adjournments *sine die*, and signing the bankrupt's certificate; but the general controlling power of the Court is unquestionable. As the Commissioner however, in this case, drew up his certificate of allowance to the official assignee, after being informed that a petition was presented against the extent of such allowance, and his attention was thus called to the merits of the case, I do not see how we can go into the particulars of the amount of the remuneration. I certainly must deprecate, after that, our sitting as a

jury to assess damages on a *quantum meruit*, when we have not the proper means of appreciating the services of the official assignee, and the Commissioner has already bestowed his attentive consideration to the subject.

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ERSKINE, C. J.—The question is of so much importance, that I am not prepared to say I have yet made up my mind on the subject. I should therefore wish to hear the case fully argued, in order that the question, as to our jurisdiction, may be finally settled. There also remains another question, namely, whether we are called upon to exercise it, under the present circumstances.

Sir J. CROSS.—The rules, which were promulgated by this Court upon its first establishment, were drawn up with great care and deliberation, to assist the Commissioners in making a proper allowance to the official assignees. It is certainly a delicate task, which the Commissioner has to perform. The intention of the rule was, that he should hold an even balance between a too rigid justice, on the one hand,—and too much generosity, on the other. The rule as to the amount of the allowance, I conceive, was intended by the Court as a guide to the Commissioner, and not as an inflexible rule, which was to be never departed from.

Mr. *Blackburne*, and Mr. *J. Russell*, appeared this day to argue the question on behalf of the respondent. There are three propositions contended for, on the part of the official assignee, any one of which will be sufficient for his case. 1st, This Court has no jurisdiction in the matter; the 1 & 2 Will. 4. c. 56. s. 57. having vested the whole power, of making the

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allowance to the official assignee, in the Commissioner, uncontrolled by any other authority. 2dly, If the Court has any jurisdiction, it is but a modified jurisdiction over the discretionary power given to the Commissioner; for where there is a discretionary power to be exercised by an inferior tribunal, the Court of Appeal will not, except under very special circumstances, interfere with that discretion; and there are no such special circumstances here. 3dly, If the Court should decide against both these propositions, then, we contend, that there is nothing to justify the interference of the Court, upon the merits.

First. As to the power of the Commissioner being uncontrollable. The act (a) for the establishment of this Court gives a jurisdiction to it quite distinct from that which it entrusts to the Commissioners, whose power and authority are perfectly independent of this Court. And the words of the 57th section of the act clearly vest the whole discretionary power in the Commissioner, as to the amount of the allowance to the official assignee; for the Commissioner is directed to order and allow him "such sum of money, as *shall appear to such Commissioner*, upon consideration of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable." The Commissioner is more likely to know what ought to be done in making the allowance, than any other person; for the official assignee acts entirely under his directions, and he is therefore the best judge of the value of the services which have been performed by the official assignee. A period of several years might elapse after the allowance had been

(a) See 1 & 2 Will. 4. c. 56. s. 2 & 7.

made by the Commissioner, and if any one was permitted to come here to dispute it, there would be no end of the inquiry. It would be a great evil, if questions like this were to come before the Court, depending, as they necessarily must, upon a number of minute circumstances, which could not be gone into, without much greater expense and delay than before the Commissioner. But suppose the Court was to say that this allowance was unreasonable, and direct the Commissioner to allow a less amount,—and the Commissioner was to reply, that he had reconsidered the point, and could not, consistently with his knowledge of the facts, say that the allowance was unreasonable. There would then arise a collision between the Commissioner and this Court, and how could the matter be set at rest? The official assignee would never get anything for his services, if this Court were to determine that one allowance was fit, and the Commissioner thought it unfit. The amount of the allowance is directed by the statute to be fixed by the Commissioner. It is true, that a certain rate of allowance is specified in Rule 27, but that is only as a recommendation to the Commissioner, and was not meant to be obligatory upon him. [*Ervine*, C. J. The form of that rule shows that the Court did not claim a jurisdiction in the matter, *a priori*, from using the word “recommended.”] The case of *Ex parte Ellis* (a), that has been cited by the other side, merely shows that the Commissioner had a discretionary power in the appointment of an official assignee, and that he was directed by the Court to exercise that discretion. In *Ex parte Candy* (b), too, there could be no doubt of the Lord Chancellor’s authority to

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(b) *Suprà*.

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regulate the conduct of the Commissioner, in rejecting any person elected by the creditors to be an assignee. But in this case the whole discretion, as to the amount of the allowance to the official assignee, is by the statute expressly vested in the Commissioner. The fixing the amount of this allowance to the official assignee, is quite as distinct and independent a power entrusted to the Commissioners, as their allowance of the bankrupt's certificate. And it has been decided in *Ex parte King (a)*, that there is no controlling power in the Great Seal, to interfere with the Commissioners in the exercise of their discretion, as to the allowance of the bankrupt's certificate.

Secondly; Supposing the Court has jurisdiction in this matter, the present is not such a case, as will justify its interference with the conduct of the Commissioner. It is well known, that in all matters of appeal from an inferior jurisdiction to a superior one, whenever there is a discretionary power vested in the Court below, which has been really and *bonâ fide* exercised, the Court above will not interfere, although such discretion may have been imperfectly exercised. This principle is always acted upon by the Court of King's Bench, in the exercise of its jurisdiction over the magistracy of the country; for notwithstanding the justices below may draw a wrong conclusion from the facts, yet if they appear to have duly exercised the discretion with which the legislature may have entrusted them in deciding upon the facts, and no point of law is involved in the case, the Court of King's Bench will not interpose its authority; although the judges often say, that they should, under the same circumstances, have de-

(a) 2 Ves. jun. 424.

cided differently. And this Court appears to have entertained the same view of the question in *Ex parte Ellis* (a); for, in that case, the Commissioner thought that he had no discretionary power in the appointment of the official assignee; but this Court informed him that he was mistaken, in point of law, and that he had such discretion. [*Erskine*, C. J. It may be observed, also,—in addition to what has been said of the way in which the Court of King's Bench exercises its jurisdiction over magistrates,—that, upon questions of costs, after there has been a taxation by an officer of the Court, they will not go into minutiae, by an examination of the different items, but will only interfere when the taxation has proceeded on a wrong principle.] [Sir G. Rose. The same practice also prevails in Courts of Equity, as to the jurisdiction over the Master. If the argument therefore applies to a ministerial officer, *à fortiori*, it must be applicable to one who, like the Commissioner, combines a judicial, as well as a ministerial, office.] The Court of King's Bench has recently decided, in the case of *The King v. The Mayor and Aldermen of London* (b), that it would not interfere with the discretion of the Court of Lord Mayor and Aldermen, in judging of the fitness of a person to be admitted an alderman. Lord Tenterden says, in his judgment in that case, “ If a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not. If such a power

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(b) 3 Barn. & Adol. 255.

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is given to any one, it is sufficient for him, in common sense, to say, that he has exercised that power according to the best of his judgment." Now it is impossible to deny, in this case, after reading the words of the 57th section, that the allowance to the official assignee is quite as much in the discretion of the Commissioner, as the admission of an alderman is in that of the Court of Lord Mayor and Aldermen. Whether the Commissioner has in this case duly exercised his discretionary power, will be best seen from the language of his certificate. He certifies, "that under and by virtue of the judicial discretion vested in him by the act of parliament,"—he ordered to be paid to the official assignee the sum of 488*l.* 17*s.* 2*d.*,—"as a remuneration for his services, such sum of money appearing to him, *upon consideration* of the bankrupt's property, and the nature and duties of the official assignee, to be just and reasonable." [*Ers- kine*, C. J. The Commissioner appears to have used in his certificate the very language of the act of parliament.] [Sir *J. Cross*. The distinction between this case and that of the *The King v. The Mayor and Aldermen of London* is this, that the Commissioner is a member, and the official assignee an officer of this Court. When a judge of either of the superior Courts at Westminster, makes an order, upon the hearing of any matter at chambers, his order is frequently reviewed by the full Court.] There the judge is sitting for the Court. But it does not follow, because in this case the Commissioner is a member of this Court, that the Court has therefore more jurisdiction to review his order, when the statute has given him expressly a discretionary power to make that order. Then, as the Commissioner has in this case certified that he has *considered* the matter, it must be presumed that he duly

examined all the circumstances, to enable him to come to a decision. [Sir J. Cross. There is one circumstance that does not appear to have been taken into the consideration of the Commissioner, and that is, that three-fourths of the property got in by the official assignee were merely received by him and paid into the bank, without any extraordinary trouble.] The concluding allegation of the petition itself, shows that the Commissioner must have considered this circumstance. It is there stated, that the creditors' assignees made their objection to the amount of the allowance, and that the Commissioner nevertheless allowed the whole sum objected to. It must be inferred, therefore, that the objection urged by the assignees was heard before the Commissioner, and duly considered by him before he came to his decision. The present proposition is not, whether the Commissioner has acted right or wrong, but whether he has *bonâ fide* exercised his discretion.

Thirdly, There is nothing on the face of these proceedings to justify the interference of the Court, in altering the allowance already made by the Commissioner to the official assignee; in order to do which, the Court must necessarily hear the whole case over again. [Sir J. Cross. The question on this head is, whether the Commissioner has, in due conformity with the directions of the act of parliament, and of the rule of this Court made for his guidance, inquired into all the special circumstances, before he allowed so large a sum to the official assignee.] This must be inferred from the concluding paragraph of the petition, and *Tiplady's* own affidavit. The Commissioner made the calculation himself, after the objection was taken by the assignees; and he must have inquired, before he could arrive

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at any result. This Court has laid down certain principles, as a general rule, for the guidance of the Commissioners; but they are not imperative on the Commissioners, nor applicable to every case of this kind that comes before them. The Commissioner has therefore, in this instance, made a slight increase to the scale of allowance mentioned in the rule. One of the circumstances that may have operated on the mind of the Commissioner might be, that he redeemed, with money out of his own pocket, a mortgage which had been made by the bankrupt. It is true, he was very soon reimbursed; but then he saved the expense of coming to this Court to redeem. [Sir J. Cross. The affidavit of the official assignee does not state that the circumstances of this case were at all inquired into by the Commissioner, or indeed that any one special circumstance was particularly inquired into by him.] The preceding paragraph in the affidavit shows that the Commissioner must have had every special circumstance before him; for it is stated, that the different items composing the sum allowed by the Commissioner were fixed and calculated by the Commissioner himself, and that the allowance was not made until after frequent meetings had been held by the Commissioners to consider the principle of making allowances to official assignees, having regard to the nature of their duties, and to the amount of the respective estates to be administered. This Court, however, will not interfere with details, but will only inquire into the principle. And it should be remembered, likewise, that the act of parliament empowers the Commissioner to make the allowance to the official assignee, not merely for the services performed by him, but also in proportion to the amount of the bankrupt's property.

Mr. *Twiss*, in reply. If the Court say, on the present occasion, that they have no jurisdiction to interfere with the decision of the Commissioner, they will give the Commissioners power in future to make any allowance they choose to the official assignees, however small the bankrupt's estate may be, without the possibility of any redress on the part of the creditors. [*Erskine*, C. J. The Court has no doubt on the point of jurisdiction; but the question is, whether it is the duty of the Court, under these circumstances, to interfere with the allowance which the Commissioner has made.] It does not appear, from the wording of the certificate, that the Commissioner made the allowance after an actual inquiry as to the services performed by the official assignee. The certificate is not adapted to the peculiar circumstances of the case, but seems to have been a common printed blank form, that may be applicable to all cases; for it follows the words of the act of parliament up to a certain point, using this general phrase, "upon consideration of the bankrupt's property, and the nature of the duties of the official assignee." But there it stops, and does not specify the duties performed by him with respect to this particular estate. The Commissioner must have acted on some general rule, giving the same per centage in all cases, whether the estate was rich or poor. This seems evident, from the affidavit of the official assignee, who states the general nature of his duties, and not those performed by him under this particular bankruptcy. But the legislature clearly intended, that the amount of the sum to be awarded to the official assignee was to depend upon the nature of his services in each particular case. It has been contended, that the Commissioner is the most

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proper person to decide this question, because the conduct of the official assignee comes under his daily notice. But it may be answered, that this familiar intercourse of the Commissioner with the official assignee may give the latter an undue influence, and furnishes the best reason for the interference of this Court, which is a tribunal far removed from all such influence. If the Court does not think proper to interfere in such a case as this, where, from some cause or other, there has been such a gross excess in the allowance by the Commissioner, the Court can hereafter never interfere, except in the case of actual dishonesty. As to the instances which have been alluded to, of applications to the superior Courts to set aside the orders of magistrates, the Court of King's Bench has no delicacy in overruling the decision of the magistrate in any case, where the rights of property are concerned. What is the common practice, also, in granting new trials? Does the Court refuse granting a new trial, out of tenderness to the judge? In *Ex parte Anthony (a)*, where the Vice-Chancellor had ruled that the Court would not review the allowance which the Commissioners had made to an accountant, except where they had proceeded on a wrong principle, the Vice-Chancellor's decision was overruled by Lord *Eldon* on appeal (*b*). The language, which the Vice-Chancellor uses on that occasion, is precisely the argument of the other side. But Lord *Eldon*, in pronouncing his judgment, says, "that though the Court will be extremely cautious on entering upon such inquiries as it is by this petition called upon to enter into, and in deciding against the judgment of the Commissioners, still, that

(a) 2 G. & J. 55.

(b) 2 G. & J. 177.

this Court has jurisdiction in such a case, I am bound to declare; and more, that I have no authority to repudiate that jurisdiction, which, on the contrary, I am compelled to sustain, until I am told by a competent authority, that in matters of bankruptcy justice is to be administered in this Court in a manner different from what it has hitherto been administered."

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ERSKINE, C. J.—The question raised on this petition is one of such general importance, that I thought it right it should receive the fullest discussion at the bar; and before any final order is made, I should wish to give it a little further consideration; at the same time, I have no desire to avoid the communication of what my present impression is on the subject; and I think, upon the whole, it will be better to deliver the opinion I now entertain, in order to prevent the necessity of calling the parties before us again for our judgment, in case I do not change my opinion. The respectability of the present petitioners leaves no room to doubt that the petition was presented *bonâ fide*, and that their sole object was to settle the principle of the allowance to official assignees. We are not called upon, however, to go into the question of the propriety, or policy, of appointing an official assignee to assist in the administration of a bankrupt's estate and effects. They are required to be appointed by the act of parliament; and if the new system proves detrimental to the interests of the creditors, it is for the legislature, and not for this Court, to interfere, for the purpose of rectifying the error. We must, therefore, merely look to the facts of this case.

The *first* question that has been argued is, whether this Court has any jurisdiction to interfere with the

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conduct of the Commissioners. The 57th section of the statute has been referred to ; in the last part of which it is enacted, "that the Commissioner may allow to the official assignee such sum of money, as shall appear to such Commissioner, upon consideration of the amount of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable ;" and it has been contended, that these words deprive the Court of any control over the discretionary power given to the Commissioner. But I think the case of *Ex parte Candy* (a) puts an end to that argument ; for it is there decided, that it was inherent in the power of the Great Seal to investigate the conduct of all persons connected with the commission. Now, the language of the former Bankrupt Act, (6 Geo. 4. c. 16. s. 61.,) under the authority of which that case was decided, is quite as strong in favour of the exclusive jurisdiction of the Commissioners, as that of the 57th section of the Bankruptcy Court Act ; and yet that case determined, that the Lord Chancellor had a general superintending power over them. This decision corresponds with the language of the second section of the Bankruptcy Court Act, which gives this Court a general superintendence and control in all matters of bankruptcy, the same as was formerly exercised by the Lord Chancellor, "except as is therein otherwise provided." Then, does the statute "otherwise provide," as to the decision of the Commissioner, in regard to the allowance to the official assignee ? I can find nothing to this effect in any subsequent clause of the act ; whereas the power given to a creditor by the 30th and 31st sections, to appeal to this Court from the decision

(a) *Supra.*

of the Commissioner in rejecting the proof of a debt, expressly confines the appeal to matters of law and equity, or the refusal or admission of evidence. So that in the case of a rejection of proof by the Commissioner, the act does "otherwise provide" and limit the power of this Court, which by the terms of the second section would, except for that provision, have had a general, instead of a limited, appellant power, over the subject-matter. It seems clear, therefore, that the language of the 57th section does not limit in any way the general scope of the jurisdiction given to this Court by the second section. Indeed, if we were to disclaim all jurisdiction in the present case, because the act has invested the Commissioner with a discretion in making the allowance to the official assignee, we might for the same reason refuse to interfere with the Commissioners on every other occasion, where they have a discretionary power to do any act.

Then, what is the duty of the Court, as to the propriety of interfering with the Commissioner on the present occasion? I think it is incumbent on us to proceed on the same principle, as that which guides the Court of King's Bench, in the exercise of its jurisdiction over magistrates; and, acting on that principle, I do not see how this Court can, in the present instance, interfere with the conduct of the Commissioner. The ground, however, of our declining to interfere, is not from any consideration of delicacy to the Commissioner, but from the peculiar nature of the duty, which the legislature has here entrusted to the Commissioner; and which renders him alone the competent judge of the amount of the remuneration to be awarded to the official assignee. By the provisions of the statute, the

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whole duties of the official assignees are performed immediately under the eye of the Commissioner; he has, therefore, the best means of knowing not only what services the official assignee has performed, but those which he has to perform. The language of the 57th section is not confined to the past services of the official assignee, but speaks of the nature of the duties *to be performed*; and perhaps when the Commissioner, in this case, fixed the amount of the remuneration to the official assignee, some of the most onerous duties still remained to be performed. It seems to me to have been properly left to the Commissioner, and to him alone, to decide the amount of the remuneration. If indeed the Commissioner, in making the allowance, had proceeded on a wrong principle, and had granted the official assignee a large allowance under this bankruptcy, because he had not been adequately remunerated for his services under another, thus making a rich estate pay for a poor one, then we might have been called upon to interfere and set the matter right. But nothing of this sort appears in the case, and I cannot presume that the Commissioner acted on such an erroneous principle; but, on the contrary, I must take it, from the language of his certificate, that he has awarded such sum as appeared to him, upon consideration of the duties of the official assignee in this particular bankruptcy, to be just and reasonable. A great deal of observation has been made, as to the amount of the remuneration, compared with the services of the official assignee, and that if he was paid in the same proportion throughout the year, his allowance would be far beyond his deserts. But that, I think, is an unfair way of putting it; for the official assignee has

duties to perform, which may extend over many years, and for which he can receive no further remuneration. In the words of Lord *Eldon*, then, which were used by him in giving judgment in *Ex parte Anthony* (a), I think "that it is incumbent upon those who impugn the Commissioner's judgment, to make it clear to the Court that the Commissioner was wrong in allowing certain items," before the Court can feel itself justified in interfering with the Commissioner on the present occasion. With respect to the difficulty there might be in examining into the nature of the services performed by the official assignee, I would not be deterred, by any consideration of this kind, if I thought it our duty to prosecute the inquiry. But my present opinion is, that it would not be right for us to interfere with the authority, which the legislature has, I think, very properly for this purpose entrusted to the Commissioner.

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Sir J. CROSS.—I entirely agree with his Honor the Chief Judge, that this is a matter of such importance, as ought not to receive from us a hasty decision. My only doubt is, whether the Commissioner, in making the allowance to the official assignee, was guided by the special circumstances of the case,—or whether he did not act under some general rule, independently of any consideration of those circumstances. I wish, therefore, to read the affidavits carefully through, before I enter upon the question of remuneration. With respect, however, to the question of jurisdiction, I think there can be no doubt on that point. The Commissioners are authorized by the 6 Geo. 4. c. 16. s. 14. to tax the solicitor's

(a) 2 G. & J. 182.

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bill, and by section 106, they are directed to make all just allowances to the assignees, without any appeal from their decision being expressly given to the Lord Chancellor in either of these matters. Yet it was never disputed, that the Lord Chancellor had jurisdiction to examine into both these matters, on appeal, and to inquire into the propriety of the amount which the Commissioners had allowed. In the case already cited, of *Ex parte Anthony* (a), Lord Eldon said, he had no authority to repudiate his jurisdiction, in reviewing the quantum of the allowance made by the Commissioners to the assignees in passing their accounts, however onerous the duty might be.

Sir G. ROSE.—Unless the opinion already expressed by his Honor the Chief Judge, and in which I beg to say I perfectly coincide, shall be altered by him, I think there is no necessity, in this case, for any further investigation. It is a matter indeed of peculiar satisfaction to me, that I am enabled to uphold this certificate of the Commissioner of the allowance made by him to the official assignee. At the same time, I fully concur in what has been said about the respectability of the petitioners, and their object in presenting this petition; which was, I have no doubt, to set an important question at rest. If, indeed, I could bring myself to believe, that this was not their *bonâ fide* motive, I do not see how we could dismiss this petition, without making them pay the costs. Upon the point of jurisdiction, I cannot entertain a doubt. The statute (b), on which the jurisdiction of this Court is founded in

(a) 2 G. & J. 182.

(b) 1 & 2 W. 4. c. 56.

matters of bankruptcy, says, in the preamble, that “it is expedient to provide means of administering and distributing the estate and effects of bankrupts, and of determining the questions which from time to time arise, touching the same.” Whatever, therefore, bears in any way upon the distribution of the bankrupt’s estate and effects, must of necessity fall within the jurisdiction of this Court. It is true, that the 57th section does not give this Court jurisdiction in express terms; but it may be observed, that in some instances the statute has given an appeal from the decision of the Commissioner, where there was no necessity for so doing. Thus, the 31st section, which relates to proof of debts, expressly gives an appeal, although, according to the established law of bankruptcy, the Court would have had jurisdiction, without the power conferred by the new act. It may be contended, that as the 14th section of the 6 Geo. 4. c. 16., which directs the Commissioners to order the petitioning creditor to be reimbursed his costs in suing forth and prosecuting the commission, contains a proviso that any creditor, who is dissatisfied with their decision, may have such costs settled by a Master in Chancery,—and as no provision of this kind is included in the 57th section of the new act,—it was intended, that the decision of the Commissioner, in this instance, was to be final. It is certainly remarkable, that the legislature has been silent on the present occasion, and has not given an appeal in express terms; but it does not appear to me, that this Court is thereby ousted of its appellate jurisdiction. The mode, however, in which I think we are bound to consider the present question, is, whether, sitting here as judges of appeal, we can take upon us the duties which the

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legislature has expressly entrusted to the Commissioner, and interfere in a matter which has been left entirely to his discretion. It seems to me, that before we can, with any propriety, interfere in such a case, we must presume, either that the Commissioner has exercised a loose discretion on the subject, or has proceeded on a wrong principle; but neither of these appears to be the case. If, indeed, we had not the certificate of the Commissioner before us, I might then entertain some doubt as to the course we ought to pursue; or if I thought that he had not fully satisfied the terms of the 57th section, I should deem it advisable to send the matter back to him for re-consideration. But when I find the Commissioner's certificate worded as it is,—when he says, in plain language, that he has awarded this sum to the official assignee, such sum appearing to him, *upon consideration* of the bankrupt's property, and the nature of the duties of the official assignee, to be just and reasonable,—can I, consistently with the fair understanding of this paper, entertain a doubt for one moment, that it was the intention of the Commissioner to give the official assignee a remuneration for his services performed, and to be performed, *in this particular bankruptcy*? Suppose this case had come before us, without any certificate of the Commissioner, and we had sent it back to him to report to us what he deemed, in his judgment, a sufficient remuneration to the official assignee, and he had made a return to us in the words of this certificate,—how could we say, that the Commissioner had not given the case due consideration, when he expressly certifies that he has? But suppose the Court were not satisfied on that point, still, practically looking at this certificate, in what mode

ought we to deal with the question? I certainly should not think it right to refer the matter to any other Commissioner, or to an officer of this Court. It would then fall upon this Court to go at length into the inquiry. Now, although I, for one, should not shrink from that duty, however incompetent I might be for the task, from my habits and my education, yet I confess I should feel very reluctant to go into such a question of a *quantum meruit*. For it is not, in reality, a question of mere work and labour of the official assignee under a commission of bankruptcy, any more than my duties as a judge of this Court would be confined to such a question. The official assignees had a right to expect something more than a bare compensation for work and labour, when they withdrew from every other occupation in the world, and devoted their time wholly to the duties imposed upon them by the new act of parliament. It seems to me, indeed, that it was one of the terms of their contract with the public, to have their allowance under each particular bankruptcy regulated by the Commissioner, who is the most competent judge of the *quantum* of remuneration due to them for their services. The question then comes to this, whether the remuneration here has been properly awarded by the Commissioner to the official assignee, as far as appears by the certificate. The amount of it may, or may not, be too much; I do not say whether it is so or not; all that I say upon that point is, that I am incompetent to decide that question; and I am, therefore, of opinion that this Court ought not to interfere with the judgment of the Commissioner.

Sir J. Cross.—I beg it may be clearly understood;

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that in what I have already said, I did not for one moment impute any motives of undue partiality to the Commissioner, or even insinuate that his certificate was in any way erroneous. The observations I have made amount to nothing more than this,—that it did not satisfactorily appear to me, whether the Commissioner had not been guided in his decision by some general rule, instead of the special circumstances of this particular case. The certificate does not state precisely how the fact is, and is so worded as to leave the matter in doubt. Now, if the allowance has been made with reference to some general rule, it would then have been made on a bad principle. I should therefore wish time to read the affidavits before I deliver my final opinion.

January 31. Sir J. CROSS now delivered his judgment, as follows:—This is a petition of the assignees chosen by the creditors, and also of a large proportion of the latter, complaining of the allowance of 488*l.*, made by the Commissioner to the official assignee for his services, and praying for a reduction of it. To this, two preliminary objections have been raised:—1st. That this Court has no jurisdiction to interfere. 2dly. That it ought not to interfere.

Before the establishment of this Court, these objections were among the expedients for getting rid of the intolerable burden of business, with which the Court of Chancery was then oppressed. They were among the public grievances, for the redress of which this Court was constituted. Yet I have often had occasion to observe, such is the force of habit, that the bar have come into this new Court, armed with the same stock

of weapons for the repulse of suitors, and which, I am sorry to say, still meet with more success than, in my humble judgment, they deserve. The legislature has constituted this a Court both of Law and Equity, and given it the exclusive superintendence over all matters of bankruptcy in England, together with all the power and authority heretofore exercised therein by the Lord Chancellor. Yet, it seems to be thought by some, that we have no general jurisdiction whatever, but in such cases only, as have actually occurred in former practice; and that it is a craft to be learned in detail from the reporters, as parallel cases successively occur. This narrow view of our duty appears to me at variance with the express words and intention of the legislature, and calculated to impair the usefulness of the Court, and to bring it into disrepute; while the public expect from us a more active, vigilant, and comprehensive superintendence, than was practicable under the former state of things. I am therefore glad to find that, on the present occasion, we are all of opinion, that the objection to the jurisdiction is unfounded.

But I have to regret, that my learned colleagues are disposed to decide in favour of the *second* objection, and think we ought not to interfere. From this opinion, after much consideration, I feel it my painful duty to dissent, and to follow the example and authority of Lord *Eldon*, in the case referred to by Mr. *Twiss*, which seems to me an express decision on this very point. I allude to the case of *Ex parte Anthony* (a). That was the petition of an assignee, complaining of the insufficiency of the allowance made to him by the

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(a) 2 G. & J. 55.

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Commissioners, for certain expenses incurred by the employment of an accountant. The then Vice-Chancellor dismissed that petition, for the same reasons that we are about to dismiss this: saying, "This appeal from the Commissioners, not being in respect of any wrong principle, but of their judgment of the *amount* to be allowed, cannot be entertained by this Court. They are the competent jurisdiction for settling the accounts of the assignees, and I cannot enter into the consideration of the *quantum* of the allowance." But that petition being carried by appeal to the Lord Chancellor, Lord *Eldon* said, this was to him a new doctrine; that the examination of the amount of the allowance was an onerous duty, which might indeed be easily got rid of by disclaiming jurisdiction; "but if the parties cannot agree," he added, "I must, be the labour what it may, read all the evidence myself, and decide in the best manner I can. All the circumstances must be looked at by me, to guide my decision, as to the amount to be allowed; but, according to the Vice-Chancellor's rule, no circumstances affecting the amount, can be looked at, at all. I hold," said Lord *Eldon*, "a different doctrine." And so, I beg leave to say, do I; and I think, in the present case, the allowance ought to be at least reviewed. I give no opinion upon the ulterior question, whether it ought to be reduced; for the decision of the Court precludes our entering upon the consideration of it. For aught *I* know, we might all have arrived at the same conclusion with Lord *Eldon* in the case referred to; who, after a careful examination of all the facts, adjudged the allowance to be right. My reasons, however, for thinking we ought to review it, are these. 1st. Be-

cause of its large amount. 2dly. Because the other assignees, and many of the creditors, complain of it. 3dly. Because it appears to have been made, without regard to the rule prescribed by this Court, and approved by the Lord Chancellor. 4thly. Because it appears to have been made, according to a general scale agreed upon by the Commissioner, without regard to the special circumstances of the present case, and therefore did not require the intervention of the Commissioner, by whom this allowance was made; for the result would be the same, by whomsoever calculated. 5thly. Because there are in this case special circumstances, that ought to enter into the calculation. 6thly. Because, this being the first case of the kind, that has come before the Court, it affords a fit occasion for revising the general rule, as well as the scale of the Commissioners, with a view to the future regulation of such allowances. And, lastly, Because I think a review, whether confirming or reducing the allowance, would be more satisfactory to all the parties concerned, and tend to conciliate the confidence of the public in the efficiency and integrity of the new establishment. As my learned colleagues, however, are of a different opinion, this petition must be dismissed.

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Petition dismissed,—both parties to have their costs out of the estate (a).

(a) It must be confessed, that the principle of calculating the allowance to the official assignee, as recommended by the 27th rule, has been in this case entirely departed from, and, as it seems too, without any adequate cause for so great an increase in the rate of the allowance. The amount of the per centage specified in the rule is 1 per cent. on monies received, and 1½ per cent. more on monies divided. But the Commissioner, here, instead of one per cent., allows five per cent. on the receipt of debts under 100l.—

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two and a half per cent. on those above 100l., and not exceeding 500l.—and has confined the allowance of one per cent. to the first 1000l. of all other debts,—reducing the allowance to half per cent. on the remainder of such debts. So that, instead of the allowance of 182l. 10s., which the official assignee would have been only entitled to in this case, at the rate of one per cent. on monies received, his allowance for monies received, alone, according to the different rates of per centage above mentioned, as settled by the Commissioner, will amount to 302l. 1s.; making a difference of 119l. 11s. between the rate of allowance originally recommended by the Court, and the rate of allowance which has been adopted and confirmed on the present occasion.

January 27.

Ex parte JAMES BARNABY MILLS.—In the matter of
SAMUEL COLMAN.

Where a creditor petitioned to annul a fiat, on the ground of the misdescription of the bankrupt, without any intention on his part to issue another fiat, and the misdescription was so slight, that no creditor was deceived by it, the Court dismissed the petition.

Although a fiat is concerted, for the purpose of defeating an action brought by a creditor against the bankrupt for the recovery of his debt,—yet where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the Court will dismiss the petition.

THIS was a petition by a creditor to annul a fiat, under the following circumstances, as stated in the petition. The fiat issued against the bankrupt on the 19th *January* 1833, who was therein described as “late of Ware, in the county of Hertford, but now of *Shottisham*, in the county of Norfolk, miller, dealer, and chapman,” which the petition alleged was a misdescription of the bankrupt at the time the fiat issued, and calculated to mislead.

On the 17th November 1823, the bankrupt entered into partnership with *Thomas Theobald*, of Norwich; as millers, and they carried on the business in co-partnership together at Ware Park Mill, in the county of Hertford, from the 17th of November 1823 till September 1832; and during all that time the bankrupt alone managed and conducted the business, and resided at Ware Park Mill, and not elsewhere. In October 1832, the bankrupt went to reside at a house belonging to his brother *Jeremiah Colman*, in the parish of Stoke Holy Cross in Norfolk, who carried on the busi-

ness of a miller in that parish, and the bankrupt furnished the house, and continued to reside therein with his family, until after his bankruptcy; and during all that period he had no other residence, and did not reside at Shottisham. After the bankruptcy, the household furniture of the bankrupt at Stoke Holy Cross was advertised for sale by the assignees, and such sale actually took place, by order of the assignees, on the 3d April 1833. A short time, also, before his bankruptcy, the bankrupt described himself as of Stoke Holy Cross, and within a month before the fiat, he received letters addressed to him at Stoke Holy Cross, and wrote letters dated from thence, addressed to the petitioner, and to other persons; and the petitioner averred, that he never heard of the bankrupt being of Shottisham, nor did he believe that he ever so described himself, or was ever so described by any other person, except in the fiat. Ware Park Mill, at which the bankrupt resided from November 23d till October 1832, is not in the town of Ware, but is upwards of a mile from it, and his address while there was "Ware Park Mill," and not "Ware." The petitioner had however lately discovered that, for three or four nights immediately preceding the fiat, the bankrupt slept at the house of a Mr. *Roberts*, whose house was within the parish of Shottisham; but otherwise, the bankrupt had no residence within that parish or village, but continued to be at Stoke Holy Cross, where his family remained during the whole time. The petition then alleged, that the description of the bankrupt's residence at Shottisham was merely colourable, and intended to deceive.

The petitioner was a creditor for 400*l.* and interest

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on a bond, on which he had commenced an action in the Exchequer, which proceeded as far as giving notice of trial at the Spring Assizes 1833, but which was afterwards countermanded in consequence of the bankruptcy. The petition charged, that the bankruptcy was concerted for the purpose of defeating the petitioner's claim; and that the only creditors of the bankrupt, except the petitioner, were his near relations or connections. The petitioner had proved his debt, under the commission, but no dividend had been declared, nor was there any probability of one. The petition further stated, that the petitioning creditor was 80 years old, and very illiterate, and was induced to issue the commission at the instance of the bankrupt and his friends; and that the bankrupt had, ever since April 1834, been carrying on the business of a miller at Poringland in Norfolk, about four miles from Stoke Holy Cross, and had made great profits thereby, and was possessed of considerable property, though he did not obtain his certificate till the 13th November 1833. The petition prayed, therefore, that the fiat might be annulled.

Mr. *Stinton*, in support of the petition, referred to the cases *Ex parte Day* (a), *Ex parte Beckwith* (b), *Ex parte Parrey* (c), and *Ex parte Beadles* (d), to show the general effect of a misdescription in the fiat, which was calculated to mislead. He also cited the case of *Steward v. Rickman* (e), where Lord *Kenyon* observed "it is not now to be questioned whether, if a trader, by concert with his creditors, commits an act of

(a) Mont. & M. 208.

(b) 1 G. & J. 20.

(c) 2 G. & J. 225.

(d) Id. 243.

(e) 1 Esp. 108.

bankruptcy, that such can be good to support a commission; that whatever idea of policy or propriety first suggested it, and though it might appear that a commission of bankruptcy is the most equitable mode of dividing the bankrupt's estate among his creditors, it is now settled, that a trader could not legally concert an act of bankruptcy with his creditors."(*a*)

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Mr. *Swanston*, for the petitioning creditor, and Mr. *Austin*, for the assignees, were not called on to argue the case.

ERSKINE, C. J.—This is a petition by a creditor, who, having originally commenced an action for his debt, abandoned the action and came in and proved his debt under the fiat. This happened about the 11th or 12th of March 1833, and it was not till about the 9th January 1834, that he presented this petition. And the grounds of his petition are; *first*, that there is an intentional, as well as actual, misdescription of the bankrupt in the fiat; and *secondly*, that the fiat was altogether concocted in fraud between the other creditors, the bankrupt, and the petitioning creditor, in order to deprive this petitioner of his just debt. In those cases where the first objection has been allowed to prevail, there has been either a contest between two petitioning creditors, as to which of two commissions should remain in force, or else an intention to sue out

(*a*) See 1 & 2 W. 4. c. 53. s. 42; *Marshall v. Barkworth*, 4 Barn. & Adol. 508; 1 Nevile & Manning, 279, S. C. In general, though the bankrupt has obtained his certificate, this will not prevent a fiat being annulled, on the ground of no trading and concert, provided a case of fraud be made out. *Ex parte Levi*, Buck, 75.

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another commission, or evidence of creditors having been actually deceived by the misdescription. In either of these cases a slight misdescription has been held to vitiate the proceedings; but wherever the commission has been superseded, it has always been with the view that a second should be issued, or that another already issued could be sustained. In this case, it is manifest that the petitioner has not been misled by the misdescription. For, it appears that he knew, at least as early as February or March 1833, that this bankrupt was the subject of the commission. It may be questioned too, whether the description itself was calculated to deceive any one; for, it appears from the affidavits, that if letters had been addressed to the bankrupt, directed to "Ware Park Mill," they would, perhaps, never have reached him, and therefore that "Ware," was his proper address. This part of the case runs very close upon that of *Ex parte Wride (a)*. Then, again, as to describing the bankrupt as "now of Shottisham," it appears that he did actually reside there for some short time before the fiat issued; which residence, though not, of itself, perhaps sufficient to confine the description to Shottisham alone, yet, when coupled with that of "formerly of Ware," seems quite sufficient to inform his creditors, who mostly resided at the latter place, and where it is presumed also they best knew the bankrupt. There is here a total absence of evidence of any one creditor being in point of fact deceived. Neither has the petitioner said a word about issuing another fiat; indeed, his object appears to be quite the reverse.

Then as to the *second* objection, of the fiat being

(a) 2 G. & J. 99.

concerted between the bankrupt and some of his creditors,—I certainly think, that the evidence on this part of the case is very strong in favour of the petitioner. It seems very clearly to have been the object of all parties to defeat the petitioner in his attempt to recover his debt; and there is in my mind no doubt, that the bankrupt's brother contrived and managed the whole affair. I will not say, therefore, that if this case had been brought forward immediately after the fiat was issued, or if the delay had been properly accounted for, the petitioner might not have succeeded in his present application. But when all the facts of the case are duly considered, more especially the petitioner's long knowledge of the bankruptcy,—his proving his debt under the fiat,—and his delay for near ten months in presenting this petition,—I think we should do very wrong, at this late period of time, to annul the fiat, and that we are therefore bound to dismiss this petition.

Sir J. CROSS.—I do not think, that the petitioner has succeeded in making out a case of mis-description sufficient to warrant the supersedeas on that ground. And although it certainly appears, that the other objection is well founded, and that the brother of the bankrupt contrived the whole scheme of issuing the fiat, using the name of *Adam Dixon* as petitioning creditor,—and although it appears, moreover, that 58% of the bankrupt's property has gone to pay the solicitor's bill, while 13% only is left to pay all the creditors,—yet, from the voluntary acquiescence of the petitioner in the proceedings under this bankruptcy, and his delay in making the present application until after the bank-

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rupt has obtained his certificate, I think the petitioner has deprived himself, by his own laches, of all right to come here now and apply for a supersedeas.

Sir G. Rose concurred.

The petition was therefore dismissed, with costs.

Westminster,
January 27,
February 18.

Ex parte JAMES THOMPSON.—In the matter of JOHN WILKS and JOHN ECROYD.

B. is a partner with A., as nail manufacturers—and with C., as grocers. The firm of B. & C. advance monies to the firm of A. & B.:—*Held*, that as B. & C. were not liable for the debts of A. & B., B. & C. could prove under a fiat issued against A. & B.

Where the respondent takes a formal objection to a petition, for want of parties, and the petition is for this cause ordered to stand over; the costs of the day are in the discretion of the Court.

The re-hearing of a former petition may be brought on, on a petition for re-

THIS was the petition of *one* of the assignees for expunging a debt, and also for rehearing a former petition, the other assignee having refused to join in the present petition.

The former petition was presented by *John Summerhill, Thomas Leech, and James Ecroyd*, for the proof of 6565*l.* 3*s.* 9½*d.* claimed to be due from the bankrupts, under the following circumstances. The bankrupts carried on the business of nail manufacturers, as partners, under the firm of *Wilks and Ecroyd*, and the bankrupt, *Ecroyd*, was also a partner with *James Ecroyd* as grocers, under the firm of *John and James Ecroyd*. *John and James Ecroyd* had a banking account with *J. W. and C. Rawson & Co.*, whose business was afterwards carried on by *Clement, Royds, & Co.*, and who made advances to *John and James Ecroyd*, which were applied to the use of the firm of *Wilks and Ecroyd*. On the 1st August 1831 there

hearing it, without obtaining a previous order for the re-hearing.

was due to the banking firm, upon the footing of this account, the sum of 2645*l.* 4*s.* 10*d.*, to secure which the firm of *Clement, Royds, & Co.* had had delivered to them certain title-deeds of the property of *Wilks* and *Ecroyd*. For the purpose also of making advances to *Wilks* and *Ecroyd*, *J.* and *J. Ecroyd* borrowed from *William Labrey* several sums of money; and on the 31st August 1831, there was due upon that account the sum of 7051*l.* 2*s.* 8*d.* *J.* and *J. Ecroyd* likewise borrowed money from various other persons, which was applied for the use of *Wilks* and *Ecroyd*. At the time of their bankruptcy, there was due from *Wilks* and *Ecroyd* to *James Ecroyd* the sum of 357*l.* 15*s.*, for four years and three quarters wages, as servant and traveller. On the 4th August 1831, *J.* and *J. Ecroyd* assigned to *J. Summershill* and *T. Leech* all their estate and effects, upon trust, for the benefit of their creditors. The prayer of this first petition was, that *J. Summershill* and *T. Leech* might be declared to be entitled to prove for the balance of the monies so advanced by *J.* and *J. Ecroyd* to *Wilks* and *Ecroyd*, and also for the said sum of 357*l.* 15*s.*

This petition came on for hearing on the 2d July 1833, and the assignees not appearing, an order was made, *ex parte*, that the trustees were entitled to prove against the joint estate of the bankrupts, for all monies advanced and paid to them by *J.* and *J. Ecroyd*, and that it should be referred to the Commissioners to take an account of the monies so advanced; and that the trustees might prove the amount to be so ascertained, deducting therefrom the sum of 2645*l.* 4*s.* 10*d.* (being the amount of the balance due from *J.* and *J.*

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Ecroyd to *Clement, Royds, & Co.*, upon the banking account) or such less sum, to which *Clement, Royds, & Co.* should by writing under their hands, consent to restrict their right or lien upon the title-deeds so deposited with them, and also not including in the amount of the monies so advanced and paid, the sum of 600*l.* in respect of a promissory note for 600*l.* of *Wilks* and *Ecroyd*, alleged to be holden by *J. Labrey*; and it was further ordered, that the trustees might enter a claim for the sum of 2645*l.* 4*s.* 10*d.*, or such other less sum, but not to prove for the same, so long as the collateral securities should be outstanding, and not have been applied and made available in or towards satisfaction of the last-mentioned sum to the firm of *Clement, Royds, & Co.*; and it was further ordered, that the trustees were also entitled to prove such sum as should be found due and owing to *James Ecroyd* for his salary or wages, as a clerk or traveller of the firm of *Wilks* and *Ecroyd*; and the costs of the trustees were directed to be taxed by the Commissioners, and paid by the assignees out of the bankrupts' estate.

On the 2d September 1833, a meeting was held by the Commissioners for the purpose of taking the accounts, in pursuance of the above order; who, after examining *James Ecroyd* as to the amount of the wages claimed by him from *Wilks* and *Ecroyd*, admitted the trustees as creditors on that account against the joint estate of the bankrupts, for the sum of 119*l.* 5*s.* The Commissioners also admitted the trustees as creditors against the joint estate for 5860*l.* 8*s.* 9½*d.*

The petitioner alleged, that the trustees ought not to have been permitted to prove any debt for wages due

to *James Ecroyd*; and that, in admitting the proof of the said debt of 5866*l.* 8*s.* 9½*d.*, the Commissioners considered themselves bound, by the order of the 2d July 1833, to receive the proof of such debt, and did not enter into any examination, or in any manner ascertain, whether the whole or any part of such sum had been ever paid by *John* and *James Ecroyd*, or by either of them. And the petitioner alleged, that *J.* and *J. Ecroyd* had never, in fact, paid or advanced any part of such sum to the firm of *Wilks* and *Ecroyd*.

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THOMPSON.

The petitioner therefore prayed, that the proofs of the said debts of 119*l.* 5*s.* and 5866*l.* 8*s.* 9½*d.* might be expunged; and that the Court would re-hear the former petition, and reverse or modify the order made thereon.

Mr. *Swanston*, and Mr. *Anderdon*, for the respondents, took a preliminary objection, that this being the petition of one assignee, and the other not being made a party as petitioner or respondent, there was a defect of parties. If the Court, therefore, thought proper to order the petition to stand over for the purpose of amendment, or for service of it on the other assignee, the respondents were, as of course, entitled to the costs of the day. [*Erskine*, C. J. I am not aware of any such inflexible rule. The costs had better abide the result of the hearing. This Court has a discretion as to costs specially given to them by the 1 & 2 W. 4. c. 56. s. 5.] Whenever a petition stands over, in order to serve a necessary party, it has been ever an invariable rule to make the petitioner pay the costs. The costs of this species of laches are never considered as costs in a cause, and therefore can never depend on the ultimate decision of the Court on this petition. For, even sup-

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**Ex parte
THOMPSON.**

posing the respondents in this case should turn out to be ever so much in the wrong, it is inconsistent with justice, that the petitioner, in seeking his rights, should put the respondents to trouble and expense unnecessary to the decision of the main question in dispute. The discretion given by the statute is not an arbitrary, but a judicial discretion, to be exercised with a due regard to precedent. And in such a case as the present, the rule has been almost invariably to give the costs of the day.

Mr. Kos, for the petitioners, was not called on to answer the objection.

The COURT thought, that no such invariable rule existed. In the present case, the party, who is required to be brought before the Court, is a mere formal party, and by no means essentially interested in the result of the petition. In Lord *Eldon's* time the costs of the day were often reserved, especially in cases where mere formal objections were taken for the want of parties. (a)

The petition was therefore ordered to stand over, and the costs of the day reserved.

February 18. The petition came on again for hearing this day. The other assignees had been served, but still refused to appear.

Mr. *Swanston* objected, that on a petition for rehearing, an order must first be granted for the re-

(a) It is strange, that there is not to be found one printed case, we believe, which is precisely in point. See Chit. Eq. Ind. tit. "Pr. Costs in cases of cause adjourned &c."

hearing before the petition could be actually re-heard, and that it must be set down for re-hearing in pursuance of such order. In this case, as no such previous order had been obtained, the petition could not now be heard.

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The COURT also over-ruled this objection; and said, that whatever was the practice in other Courts, it had always been customary in bankruptcy, that the petition to re-hear, and the actual re-hearing, should come on together; and, therefore, that no previous order to re-hear was requisite.

Mr. *Koe*, and Mr. *Sharpe*, were then heard upon the merits, in support of the petition. A partner is never allowed to prove against his own firm, in competition with the joint creditors of the firm. The present case is nothing more, than that of one of a firm borrowing money on the security of the firm, for the use of the partnership,—and with the additional security of his brother, who was nothing but a clerk in that house for whose purpose the money was borrowed. The circumstance of his being joined by name with the bankrupt, *John Ecroyd*, in another concern, does not vary the general principle that prevails, as to proof among partners. In *Ex parte Sillitoe* (a), where two partners of a large banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade, in respect of monies procured for the benefit of the aggregate firm on the credit of the indorsement of the separate firm, it was held by Lord *Eldon*, that no proof could be made, on behalf of the

(a) 1 G. & J. 374.

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THOMPSON.

firm of the two, against the aggregate firm, in respect of that debt; and that it was only in the case of dealings *as between trade and trade*, and in which the articles of one trade had been furnished to the other, that such proof could be admitted. Precisely the same doctrine has been held in *Ex parte Cooke (a)*, viz. that a debt arising out of the mere loan of money, under these circumstances, was not proveable.

Mr. *Swanston*, for the proof, relied on *Ex parte Adams (b)*, and was then stopped by the Court.

ERSKINE, C. J.—The foundation of the present petition is a claim by *Summershill* and *Leech*, as trustees for the creditors of *J. and J. Ecroyd*, to be allowed to prove a debt arising out of money advanced by *J. and J. Ecroyd* to the firm of *Wilks* and *John Ecroyd*, and which claim the Commissioners rejected in the first instance, on the ground of the objection now insisted upon by the assignees, namely, that one of the creditors claiming to prove was also one of the firm, against whose estate the right of proof was claimed. The creditors therefore applied to this Court, by petition, to be permitted to prove their debt; and the petition being called on in its regular turn, and no one appearing to oppose it, the petitioners were directed to take such order as they could abide by. They accordingly took the order for proof, which is now sought to be set aside; but I do not think, under all the circumstances of the case, that they took more than they were really entitled to.

Looking at this as a question arising before us on

(a) Mont. Rep. 228.

(b) 1 Rose, 305.

petition for the first time, which the prayer for rehearing obliges us to do, it is necessary for us to inquire, whether, as one of the parties claiming is a partner in the house against which the claim is made, this proof ought to be allowed to stand. There is no need, on the present occasion, to go through all the cases bearing upon this point; because I think there is but one, that is fairly applicable to, and decisive of, the case now before the Court; for the other cases merely involve the question, whether minor partnerships can prove against the larger firms, of which the former are a component part. But in *Ex parte Adams(a)*, the case to which I allude, Lord *Eldon* says, "In none of the cases, in which the partner constituting a distinct house has ever been admitted to prove, has the estate, against which he has been admitted, been liable with that distinct house for joint debts. I know no case, where a solvent partner has been admitted to prove against creditors, who have a demand against him. In the case of a firm of *A. B. C. and D.* proving against the firm of *A. B. C. and E.*, *A. B. C. and D.* are not liable for any joint debts with *A. B. C. and E.*" Now that reasoning is quite decisive of the present question; for in this case the firm of *J. and J. Ecroyd* are not liable to the debts of *Wilks* and *John Ecroyd*. I am therefore of opinion, that this petition must be dismissed.

Sir J. CROSS.—I entirely concur in the opinion expressed by his Honor the Chief Judge. The case of *Ex parte Sillitoe* merely decided, that a minor firm, composing a part of an aggregate firm, could not prove

(a) *Suprà*.

1834.
 ———
Ex parte
THOMPSON.

1884.
 —
Ex parte
Thompson.

against the aggregate firm for money lent, although such proof might be admitted for goods supplied by the minor to the aggregate firm. That case does not in any way bear upon the present.

Sir G. Ross.—It has been settled for years, that if *A. B. and C.* are partners, neither of them can prove against their firm for money lent. So where *A. B. and C.* are partners, *A. and B.* cannot prove against *C.* But if *A. and B.* are partners, and *B. and C.* are partners in a distinct firm, the one firm then may prove against the other.

The proof was therefore ordered to stand, and the petition for rehearing dismissed; the petitioners to pay their own costs, and those of the respondents to be paid out of the bankrupt's estate.

Westminster,
January 31,
coram
Sir J. Cross.

Ex parte GILES.—In the matter of GILES.

Where a warrant is issued against a bankrupt for non-compliance with an order of the Court, and the warrant is lost, the Court will renew the warrant, or grant a copy of it, as a matter of course.

IN this case the bankrupt had petitioned to annul the fiat, which was dismissed with costs; and the costs not being paid, a warrant had been issued against the bankrupt for non-payment of them. This warrant by some accident had been lost, and the object of the present petition was, that the Court would issue a fresh warrant, proper affidavits having been made substantiating the facts.

Mr. Swanston appeared in support of the petition.

Mr. Mansell, contra. The bankrupt has brought an

action of trespass in the Exchequer to try the validity of the fiat, and he has also preferred an indictment against the petitioning creditor for perjury. The petitioning creditor has absconded to America, and the trial of the action has been stayed until the last day of the next Middlesex Sessions. Before the party ought to be attached for contempt, for non-payment of costs in any proceeding under this fiat, it ought to be quite clear, that the fiat had legally issued against him. And, as the other side are now seeking an indulgence, and we have done every thing in our power to put an end to the proceedings under the fiat, the Court will not in this case lean against the liberty of the subject.

1884.
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Ex parte
GILES.

Sir J. CROSS.—As no ground whatever has been shown in this case for the suspension of the warrant, the renewal of it is quite a matter of course.

Mr. Swanston said, that he would take an order merely for a copy of the former warrant.

Ordered accordingly.



1834.

Southampton
Buildings,
February 20.

A mortgagee
having bid at the
sale of the mort-
gaged property,
and become the
purchaser, with-
out having pre-
viously obtained
an order for him
to bid, the Court
granted him an
order *nunc pro
tunc*.

Ex parte PEDDER.—In the matter of HADWEN.

IN this case a mortgaged estate had been put up for sale, and the mortgagee being present at the sale, and finding the property was going at an under value, bid for it, without having obtained previous leave of the Court, and was declared the purchaser as the highest bidder. He had made an affidavit in support of this petition, denying any intention to bid previous to the moment of doing so. The present petition was therefore presented by the mortgagee for an order to confirm the sale, by giving him leave to bid *nunc pro tunc*.

Mr. *Swanston* for the petition.

Mr. *Bethell* consented, on the part of the assignees.

The COURT, under the circumstances, made the Order as prayed, as there seemed to be no probability that leave to bid would have been refused, if it had been previously applied for. But they expressed a hope, that this would not be taken as a precedent for future laches in cases of this description (a).

(a) And see *Ex parte Ashley, ante*, 510.



1834.

Ex parte JOHN ADAMS.—In the matter of DANIEL THACKERAY and others.

Southampton
Buildings,
March 3.

THE petitioner in this case was the sole assignee of the bankrupt's estate, and the prayer of the petition was to expunge a debt, under the following circumstances:—

The bankrupts, *Daniel Thackeray*, *Joseph Thackeray*, and *Jesse Baldwin*, were brewers at Liverpool, and Messrs. *Woodward* and Co., the creditors whose debt was sought to be expunged, were corn-dealers at the same place, and had supplied the bankrupts with goods to the amount of 289*l.* 1*s.* 3*d.*, for which sum *Woodward* and Co. had proved under the fiat, and which proof was now sought to be expunged. After making this proof, *Woodward* and Co. brought an action to recover the same sum against one *J. Wolstencroft*, on the ground that he was a partner with the bankrupts when the goods were sold. This action was tried at the last August assizes at Lancaster, when *Woodward* and Co. recovered a verdict against *Wolstencroft* for the full amount; but the defendant had since obtained a rule *nisi* for a new trial, which was still pending. In the month of July preceding the trial, a dividend of 4*s.* 3*d.* was declared under the fiat; the amount of which on the debt of *Woodward* and Co., namely, 61*l.* 8*s.* 6*d.*, was tendered to them a few days before the trial, but which they refused to accept. The petitioner had advertised a final dividend for the 18th January, and had previously required *Woodward* and Co. to consent to their debt being expunged, for the purposes of a dividend; but they refused to consent to this proposal.

A. B. C. & D. contract a debt with *W.* for goods supplied to them on their joint account. *A. B. & C.* become bankrupt, and *W.* proves the amount of his debt under their commission, stating in his deposition that *A. B. & C.* only (without noticing *D.*) were jointly indebted to him; but he afterwards sues and recovers the amount of his debt against *D.*, the solvent partner. *Held*, that in consequence of the informality of his proof, *W.* must pay the costs of the application of the assignee to expunge it.

1884.

Ex parte
ADAMS.

The petitioner alleged, that in the event of *Woodward and Co.* opposing the rule for a new trial, and obtaining a verdict and payment in the action against *Wolstencroft*, who was a perfectly solvent person, the estate of the bankrupts would be put to the further expense of audit and dividend meetings, in order to divide among the creditors the amount of the dividends set apart, in respect of the debt proved by *Woodward and Co.*

The petitioner prayed, therefore, that the Court would order the proof of the debt to be expunged, so far as the same was applicable to the purpose of dividends, and that *Woodward and Co.* might pay the costs of the petition.

Mr. *Swanston*, who appeared in support of the petition, said, that *Woodward and Co.* had, since the presentation of the petition, made an election to go against the solvent partner, and that he now asked for the costs of this petition.

Mr. *Twiss*, for the respondents. Since the petition was presented, the rule for the new trial has been discharged; and we therefore now admit that *Wolstencroft* was a partner with the bankrupts at the time of the contracting of the debt, and is at this time solvent; and have, consequently, agreed to abandon our proof. The present proceeding therefore being quite unnecessary, the petitioner is not entitled to the costs. Our claim against the three could not be determined, until the rule for the new trial was determined. We have been harassed by this petition, to make our election, before the action against *Wolstencroft* was fairly disposed of. If we had made a decided election to

prove against the estate, we could not have gone on with the action; and, on the contrary, if we had made a formal election to proceed with the action, we must then have abandoned the proof. We were quite ready to expunge the proof, as soon as we had fixed the solvent partner.

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Ex parte
ADAMS.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—Messrs. *Woodward* and Co. were creditors of the four, and not of the three; but they chose to prove against the three, as if they had been the only partners. This was at their own peril; and it appears, that they resolved to adhere to this form of proof, although they were applied to for their consent that the proof might be expunged. This, as it appears to me, was an improper course of proceeding on the part of the respondents. The petitioner is entitled to an Order that the proof shall be expunged, so far as the same respects any dividends already declared, or hereafter to be declared; and I think, that the costs of this petition must be paid by the respondents.

Sir J. Cross.—I look at the case in this point of view. The respondents would have been entitled to their costs, if they had not done wrong in making this informal proof, namely, in alleging in their deposition that the three bankrupts were indebted to them, instead of the bankrupts, together with their partner *Wolstencroft*. The costs, therefore, of expunging this proof, arise entirely out of the error of the respondents.

Sir G. Rose concurred.

1834.

**Ex parte
ADAMS.**

ERSKINE, C. J.—The Court only gives the petitioner the costs of this application. If it had not been for his proposition to expunge the proof, and the refusal of the respondents, the case would have been different.

Order made as prayed, with costs to be paid by the respondents.

*Southampton
Buildings,
March 3.*

Ex parte COATES and HAMMOND.—In the matter of **WOODING.**

A. and B. sue out a commission as solicitors to the petitioning creditor, and the assignees afterwards appoint **C.** to act as solicitor; but it is agreed between him and **A. and B.**, with the privity of the assignees, that all three shall jointly act as solicitors and share the profits; and the assignees afterwards recognize the acting of **A. and B.** as such joint solicitors.

Held, 1st. That this amounted to a retainer by the assignees of **A. and B.**, as joint solicitors with **C.**

2dly. That the Court of Review had jurisdiction, on the petition of **A. and B.**, (**C.** having been served with it,) to enforce the payment by the assignees of the solicitor's bill of costs.

3dly. That the assignees were liable for the payment of such costs, whether they had funds in their hands, or not.

THIS was the petition of two solicitors, who were partners, praying that the assignees might be directed to pay to them the sum of 57*l.* 3*s.* 3*d.*, under the following circumstances. It appeared, that the petitioners sued out the commission as solicitors to the petitioning creditors; and that after the choice of assignees, the assignees were about to nominate a *Mr. Warburton* as their solicitor, when, (through the intervention of other creditors, who were desirous that the petitioners should continue as solicitors to the commission,) an arrangement was made, to which the assignees were parties, that the petitioners and *Warburton* should jointly act as the solicitors to the commission, and share the profits from the beginning. In pursuance of this agreement, the petitioners paid *Warburton* one half of the profits made prior to the choice of assignees, and continued to act in conjunction with him, as the solicitors under the commission, and in that character attended the meet-

ings, and advanced monies for the necessary expenses of the commission to the amount of 46*l.* A bill to the amount of 88*l.* 18*s.* 1*d.* was afterwards delivered in the joint names of the three solicitors, which was settled by the Commissioners, and reduced to the sum of 67*l.* 19*s.* 7*d.*, of which 46*l.* 6*s.* 11*d.*, money actually advanced by the petitioners, formed a part. The petitioners, therefore, claimed the repayment of that sum, and one half of the profits, making in the whole the sum of 57*l.* 3*s.* 3*d.*, leaving the other half of the profits for *Warburton*, according to the agreement.

The assignees, by their affidavit, denied that they authorized the petitioners to act as solicitors after the choice of assignees; and alleged, that the first bill of the petitioners swallowed up all the effects; that the meetings of Commissioners, and other things for which the petitioners had charged, were wholly unnecessary, and merely with a view to swell the costs; and that the assignees had only collected and got in the sum of 36*l.* 15*s.* 6*d.* since the choice of assignees, and had only 6*l.* now remaining in their hands.

The affidavits of the petitioners, in reply, stated, that several meetings of the Commissioners were held for the examination of the bankrupt, at which the assignees attended, and that the bankrupt was finally committed by the Commissioners for not answering satisfactorily.

The assignees filed another affidavit, by way of rejoinder, in which they swore, that they never employed the petitioners after the choice of assignees.

Warburton, the other solicitor, was served with this petition, but did not appear.

Mr. *Foster*, in support of the petition. Although

1834.

Ex parte
COATES
and another.

1834.

Ex parte
COATES
and another.

the assignees may have no assets in their hands, they are nevertheless liable to the petitioners for the amount of their demand,—or, at all events, for the amount of the payments which have been made by them; *Ex parte Hartop* (a). [Sir J. Cross. Your affidavits show consent and approbation of the assignees, as to the employment of the petitioners, without stating that they were *retained* by the assignees.] We rely on those acts of the assignees which recognize the petitioners as solicitors, as an equitable retainer. They were privy to the agreement between the petitioners and *Warburton* at the choice of assignees, as to the conduct of the future proceedings under the commission,—they permitted the petitioners to make payments,—and they signed the advertisements for the different meetings of the Commissioners. The petitioners paid the Commissioners their fees out of their own pockets, except those of the two last meetings, which were paid by the assignees; but the assignees requested the petitioners to pay the messenger the amount of his bill. The assignees have not paid anything to *Warburton*, nor have they stated that he has applied, or made any claim.

Mr. *Anderdon*, for the assignees. There is no authority to be found for such a petition as this. A solicitor cannot in any Court, either of law or equity, have a summary order for payment of costs owing to him by his client, but must bring his action to recover them (b). And there is no reason, why the solicitor to assignees should have any more right to petition against them,

(a) 12 Ves. 349; 9 Ves. 109; 1 Rose, 449.

(b) *Anon.* Buck, 475.

for the payment of his bill of costs, than against the petitioning creditor. [Sir J. Cross. The petitioning creditor has no funds, that makes some difference.] The jurisdiction of this Court to make the order prayed for, if it exist at all, can only exist provided there are assets, *Ex parte Haynes* (a). [Erskine, C. J. The cases of *Ex parte Johnson* (b), and *Ex parte Hartop* (c) decide, that although the assignees have possessed no effects, they are nevertheless liable to the messenger, on petition, for the payment of his bill subsequent to the choice of assignees.] In *Ex parte Burwood* (d), and *Burwood v. Felton* (e), it was decided, that the solicitor to the petitioning creditor is not liable to the messenger for his costs up to the choice of assignees, except upon special contract; in which case, his remedy is not by petition, but by an action at law upon the contract. If the messenger therefore cannot apply for the extraordinary aid of this Court against the solicitor to the commission, because he may bring an action against the petitioning creditor for the recovery of his costs; so, in this case, as the solicitors might sue the assignees at law, using the name of *Warburton* conjointly with their own, they have no right to come and ask for the interposition of this Court.

There is another point, which demands the attention of the Court, and that is, the conflicting state of evidence as to the retainer. The petitioners brought in a large bill of costs, amounting to no less than 120*l.* up to the choice of assignees, when this sum was duly paid them by the assignees; who then appointed *Warburton*

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Ex parte
COATES
and another.

(a) 1 G. & J. 35.

(b) *Ibid.* 23.

(c) 1 Rose, 449.

(d) 2 G. & J. 70.

(e) 3 Barn. & Cressw. 43.

1834.

Ex parte
COATES
and another.

as their solicitor; and the proceedings under the commission are now in his hands. Any agreement between these petitioners and *Warburton*, as to a division of the fees, cannot bind the assignees. The petitioners were to give their assistance to *Warburton*, in the same way that a London agent does to a country attorney; and this connection between the two attorneys in no way interferes with the relation of attorney and client. The agent has no right of action against the client for his fees, but only against the attorney, who is his principal. In this case, the agreement between the petitioners and *Warburton*, which was in writing, expressly states that the petitioners and *Warburton* were to divide the profits of *Warburton's* employment, as solicitor to the assignees. At all the meetings, except one, *Warburton* was present and acted as the solicitor; which shows plainly, that the credit or authority was given solely to *Warburton*. If there had indeed been any assets in the hands of the assignees, then perhaps the petitioner might have had an equitable lien on them; but, in the absence of any assets, they can have no possible claim against the assignees. There is no distinction, in this respect, between costs out of pocket, and other costs; if the petitioners are entitled to either, they are entitled to both. But the assignees have no fund to pay these costs—there is nothing here, of which the assignees are the stake-holders. [Sir *J. Cross*. Supposing *Warburton* had paid these fees to the amount of 46*l.*, do you deny your liability to him?] We do, except in an action at law.

Mr. *Foster*, in reply. What Lord *Eldon* says in *Ex*

parte Hartop (a), and *Ex parte Johnson* (b), clearly shows, that the Court will interfere between its own officers, although they may have their remedies against each other at law. With respect to the alleged deficiency of assets,—the assignees have entered into a compromise with the bankrupt's father, for the settlement of a debt due from him to the estate; which if they had not done, there would then have been a sufficiency of assets. But, we contend, that the assignees are liable at all events, independently of any question of assets.

1834.

Ex parte
Coates
and another.

ERSKINE, C. J.—If this had been a case, where the petitioners had a regular retainer by the assignees to act as their solicitors, and the assignees had sufficient funds in their hands, there would then have been no question, but that a petition would lie against them for the payment of what was justly due to the petitioners. But this is a petition of two out of three solicitors, to have the payment of their fees apportioned; when the other solicitor, *Warburton*, is not before the Court. There is also a material question of fact for our consideration, namely, whether the circumstances of the case amount to an agreement by the assignees to employ the petitioners as solicitors with *Warburton*. And then again, the question of law arises, whether this Court could make assignees pay the solicitor employed by them, when they have no funds of the bankrupt's estate in their hands. There is some difficulty in the case, too, as *Warburton*, the other solicitor, is not before the Court. We will therefore consider the matter, before we deliver our judgment.

(a) 1 Rose, 449.

(b) 1 G. & J. 23.

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Ex parte
COATES
and another.
March 14.

ESKINE, C. J. now delivered the judgment of the Court. (After recapitulating the facts of the case, as stated in the petition, his Honor proceeded as follows:) The assignees in their affidavits, and by their counsel, deny the fact of the retainer of the petitioners, as their solicitors; they also deny their liability beyond the amount of funds in their hands, amounting only to 6*l*.; and they further deny the jurisdiction of the Court to enforce that liability, if it existed. As to the retainer, they say, they appointed *Warburton* as their solicitor, and positively deny that they ever appointed the petitioners, or made any arrangement or agreement with them, or in any way authorised them to act as their solicitors, or ever consulted them as to any proceedings under the commission, or in any manner relating thereto. Here, then, the parties are directly at issue; and yet, perhaps more, as to the conclusion to be drawn from the facts, than as to the circumstances themselves. For the respondents admit, that an agreement was made at the meeting between the solicitors, for sharing the profits under the commission; they do not deny their privity to and acquiescence in such an arrangement,—they do not deny the fact of the attendance of the petitioners at the meetings, and of their performing the functions of solicitors to the commission,—they do not question the fact of the advance by the petitioners of the sum charged for the expenses of the meetings,—nor do they deny the delivery of the bill in their joint names, and its taxation and allowance in that form. And therefore it becomes a question, not of veracity, but of construction, whether, under all the circumstances, the assignees have made themselves responsible to Mr. *Warburton* only, or to Mr. *War-*

burton and the petitioners jointly, as solicitors under the commission. If there had been no express appointment of Mr. *Warburton*, as their solicitor, the mere circumstance of the solicitors, who took out the commission, continuing to act as the solicitors under it, with the privity and knowledge of the assignees, would have been sufficient evidence of employment by them as such. *Tarn v. Heys* (a). Then if, having appointed *Warburton* as their solicitor, he, with their privity and acquiescence, entered into the agreement with the petitioners, as stated in the petition,—and the assignees, knowing of this agreement, permit the petitioners to act as joint solicitors, to advance their own monies for the expenses, and when the bill is delivered in the joint names of the three, make no objection, except as to the amount, and allow it to be taxed and filed with the proceedings in that form,—can any other conclusion be fairly drawn, than that the assignees have recognized the petitioners, as jointly employed with Mr. *Warburton*? A careful examination of the affidavits has satisfied my mind upon this point; and the only doubt I have entertained on this part of the case has been, whether this Court ought to decide the question, or leave the parties to their ordinary remedy at law. Looking, however, at the substantial merits of the case, and seeing that the assignees do not pretend that they have paid Mr. *Warburton*, or that they have any set-off against him,—that Mr. *Warburton* does not deny the right of the petitioners to the share they claim,—and that the only substantial question raised by the assignees is, whether they are liable at all beyond the funds in hand,—I think it is due, in

1884.

Ex parte
COATES
and another.

(a) Holt's N. P. Rep. 378, n.; 1 Star. Rep. 278.

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Ex parte
Coates
and another.

justice to all parties, that we should save them from the expense of further litigation, if we have jurisdiction so to do.

Without referring to any authorities, but regarding the question as one arising in the bankruptcy, between two sets of officers engaged in prosecuting the commission, relative to the payment of the expenses of working it,—I should have entertained no doubt of the jurisdiction of this Court to decide it. Two cases were cited by the counsel for the assignees; an anonymous case reported by Mr. *Buck* (a), and *Ex parte Haynes* (b). The latter case does not affect this question; because, the point there decided was, merely, that the petitioning creditor, and not the solicitor, ought to be the party applying for the order on the assignees to pay the costs incurred prior to the choice of assignees; whereas the costs, now in dispute, are costs subsequent to the choice. The first case, however, from *Buck's Reports*, in which the Vice-Chancellor is reported to have disclaimed any jurisdiction to compel the petitioning creditor to pay the solicitor his bill, seemed to demand further consideration; though that case struck me as being at variance with those cases, in which the Lord Chancellor had interfered in favour of the messenger; and upon further consideration, I find no principle, upon which the claim of the solicitor should be referred to a court of common law, which would not equally apply to the messenger's bill. And yet in the cases of *Ex parte Clarke and Cogan* (c), *Ex parte Johnson* (d), and *Ex parte Burwood* (e), the claims of

(a) *Buck*, Rep. 475.

(c) 1 C. B. L. 17.

(e) 2 G. & J. 70.

(b) 1 G. & J. 35.

(d) 1 G. & J. 23.

the messenger have been enforced by orders in bankruptcy; and in the case of *Ex parte Hartop* (a), Lord *Eldon* illustrates the power of the Court to interfere on behalf of the messenger, by what he seems to consider its unquestionable jurisdiction in behalf of the solicitor. "The petitioning creditor," he says, "is liable to the solicitor for the expenses of conducting the commission up to the choice of assignees; and although the solicitor may maintain an action against him for his bill of costs, yet this Court would not hesitate, upon petition, to make an order upon him for the payment of it." And the learned judge, who is reported to have decided the contrary in the case in Mr. *Buck's Reports* before alluded to, would at once, in the case of *Ex parte Haynes* (a), have dismissed the petition, if he entertained the opinion attributed to him in the first case. I cannot, therefore, consider the authority of that case, so imperfectly reported, sufficient to outweigh the other cases; which, though not so directly in point, all strongly lead to an opposite conclusion.

But the respondents say, they are only liable to the amount of assets in their hands; which, as they allege, do not exceed 6%. But in this, I think, they are equally unsupported by principle and precedent. The claim of the solicitor does not depend upon the contingency of the assignees procuring funds from the bankrupt's estate; but, like that of the messenger, rests upon their employment by the assignees; and both at law, and in bankruptcy, their liability to the messenger has been decided to be wholly independent of the state of the funds; and the principle of those decisions

1884.

Ex parte
Coates
and another.

(a) 1 Rose, 450.

(b) *Supra*.

1834.
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Ex parte
Cairns
 and another.

applies with equal force to solicitors. It is enough, upon this point, to refer to the cases of *Tarn v. Heys* (a), *Hart v. Biggs* (b), *Ex parte Hartop* (c), and *Ex parte Johnson* (d). Being satisfied therefore upon the facts, that there was enough to constitute a joint employment of the three as solicitors under the commission,—that the assignees are liable to pay the amount of their bill of costs, whether they have funds in their hands, or not,—and that this Court has jurisdiction to enforce the payment, upon petition;—and further, that it is mercy to all parties to exercise that jurisdiction on this occasion,—we are of opinion, that the petitioners ought to take an order declaring them and Mr. *Warburton* to have been jointly employed by the assignees, as solicitors under the commission; and that there is due to them, as solicitors, the sum of 67*l.* 19*s.* 7*d.*; (or, if it is wished, let it be referred to Mr. *Gregg* to ascertain the amount,) and directing the assignees to pay the amount to the joint order of the petitioners and Mr. *Warburton*; and, if they cannot agree, then let them pay the money into Court; with liberty for either party to apply.

Mr. *Anderdon*, for the assignees, having declared the intention of his clients forthwith to comply with the order of the Court, without further taxation,

The Order was made for the payment as above;
 and if no demand for the payment was made
 before the first day of term, then the money
 was directed to be paid into Court.

(a) Holt, 378, n.; 1 Star. 278.

(c) 9 Vez. 109.

(b) Holt, 245.

(d) 1 G. & J. 23.

1884.

Ex parte JOURDAIN.—In the matter of SWAINSON.

THIS was the petition of a creditor for re-taxation of the solicitor's bill up to the choice of assignees, which had been allowed by the Commissioners, and paid by the assignees to the solicitor, and also for taxation of his bill for costs subsequently incurred. The first bill having been paid, the objectionable items were set forth in the petition. The bankrupt was a trader in London; and yet the solicitor issued a fiat against him directed to Commissioners at Manchester, under the pretence that it would be more conveniently executed at the latter place; notwithstanding the debts proved by the London creditors under the fiat amounted to 10,000*l.*, and those proved by the Manchester creditors were only 2000*l.* The solicitor had also, besides charging one pound for every meeting, made other charges for preparing the depositions, and for every thing else that was done at each of the meetings.

Southampton
Buildings,
March 3.
Solicitor's bills,
though allowed
by Commis-
sioners, and
paid by assign-
ees, ordered to
be taxed, where
objectionable
items pointed
out.

Mr. *Swanston*, and Mr. *Sharpe*, in support of the petition, relied on the objectionable items as a sufficient ground for the re-taxation of the first bill, and on the provision contained in the statute (*a*) for the taxation of the costs incurred subsequently to the choice of assignees.

Mr. *Montagu* appeared for the respondents.

The COURT made the common order, that it should be referred to the registrar to review the taxation, and that the costs of the petition should abide the event.

(*a*) 6 *Geo. 4. c. 16. s. 14.*

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Ex parte WILLIAM PATRICK and THOMAS GEDDES.

In the matter of CARSTEN HOLTHOUSE.

Westminster,
April 18 & 19.

A customer applied to his bankers to lend him 4000*l.* at five per cent., which the bankers agreed to. He then asked the bankers, what balance he was expected to keep with them; they answered, he could not keep less than 1000*l.*; upon which the customer said, "Very well, they might leave it to him."

The customer paid into, and drew out from, the banking house in one year various sums amounting to 108,000*l.*:—
Held that, under these circumstances, the loan was not usurious.

THIS was a petition by assignees to expunge a proof, on the ground of the debt being tainted with usury,—or that an issue might be directed, if the Court entertained any doubt upon the facts, which were as follow:—

In January 1825, the bankrupt, being in want of money, applied to his bankers, *Ladbroke & Co.*, to advance him 4000*l.*, stating that he could deposit a policy of assurance for 4000*l.* upon his life with them, as a security. The bankers consented to make him the advance; and after the loan was agreed upon, the bankrupt inquired of one of the partners, what balance they expected he should keep with them? who replied, that the bankrupt could not keep less than 1000*l.*; and the bankrupt said "very well," and that they might leave it to him. The bankrupt stated, on his examination before the Commissioner, that if he had not borrowed that sum from the bankers, he would not have made any such inquiry or arrangement. But it did not appear, that the bankers either directly told him, or indirectly gave him to understand, that they would not lend the 4000*l.*, unless he would agree to leave an average balance of 1000*l.* in their hands; but, on the contrary, the bankrupt expressly stated in his examination, that it was not until after they had agreed to lend the 4000*l.* on the security offered, that anything was ever said on the subject of what would be a proper balance. From the period of the loan, until the time of *Holt-house's* bankruptcy, which occurred on the 28th February 1833, his account with *Ladbroke & Co.* amounted to very large sums. In 1825 it was 66,606*l.*, and went

on gradually increasing until 1832, in which year it was 108,874*l*. The bankrupt, by a plan of his own, which he did not explain or even communicate to the bankers, ascertained annually what he thought would be a compensation to them for the diminution of profit arising from his not adhering to the understanding about the average balance, and sent them a check for the amount, accompanied with the following note: "Mr. *Holt-house's* compliments to Messrs. *Ladbroke & Co.*, and has inclosed a check for the difference of interest on balance." The bankrupt, in his examination before the Commissioner, explained his plan in these words: "I made out a weekly account of the balance in my bankers' hands every Tuesday, after I had paid in my week's collection, and by dividing the aggregate by 52, I got at the presumed average balance for the year; and on the difference between that average balance and 1000*l*., I calculated interest at five per cent., and sent the check for that amount."

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Ex parte
PATRICK
and another.

The Commissioner was of opinion, that the transaction did not amount to usury, and therefore admitted *Ladbroke & Co.* to prove for the sum of 3447*l*. 6*s*. 4*d*. the amount of the balance owing to them from the bankrupt.

Mr. *Montagu*, who with Mr. *J. Russell* and Mr. *Wright* appeared for the respondents, took a preliminary objection to the jurisdiction of the Court to hear this petition, inasmuch as the Commissioner had decided upon a mere question of fact, which was not the subject of appeal; and he referred to what the Lord Chancellor said in the case of *Ex parte Turner (a)*, and to the 31st section of the Bankruptcy Court Act (*b*),

(a) 1 Mont. & A. 257.
VOL. III.

(b) 1 & 2 Will. 4. c. 56.
X X

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Ex parte
PATRICK
and another.

which limits the right of appeal from the decision of the Commissioner, to “any point of law, or matter of equity, or the refusal or admission of evidence in the case of any disputed debt.”

Mr. *Marshall*, who appeared for the official assignee, said, that in *Ex parte Turner* the point, as to the want of jurisdiction of the Court of Review, was merely suggested by counsel in argument, and was not expressly decided by the Lord Chancellor, whose judgment was confined to his own want of jurisdiction.

ERSKINE, C. J.—There being no words to *exclude* the jurisdiction of this Court contained in the 31st section of the statute that has been referred to, we must look back to the wording of the previous section, the 30th, in order to discover the real meaning of the 31st. Now, the 30th section of the act provides, that any one of the Commissioners may “adjourn the examination of any bankrupt or other person to be taken either before a Sub-division Court, or the Court of Review,”—without confining the jurisdiction of this Court to any point of law or matter of equity, or the refusal or admission of evidence. If the legislature, therefore, had determined by the 30th section not so to limit the jurisdiction of this Court on an appeal from a single Commissioner, our jurisdiction in this respect is certainly not taken away by any language used in the 31st section.

Sir J. CROSS.—The counsel for the respondents interposes a dictum of the Lord Chancellor, which, when referred to, has no bearing whatever on the objection. Nor does the wording of the 31st or 30th sections of the act appear to me to afford any grounds for it.

Sir G. ROSE.—Unless there are specific words of exclusion in the act to oust the jurisdiction of this Court, the Court has precisely the same jurisdiction, which the Great Seal possessed over the Commissioners before the passing of the act.

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Ex parte
PATRICK
and another.

Mr. *Swanston*, and Mr. *Purvis*, in support of the petition. The question in this case is entirely a matter of fact, namely, whether it was stipulated by *Ladbroke & Co.*, in the treaty with the bankrupt for the loan to him of the 4000*l.*, that they were to receive more than five per cent. interest on that sum. Now, the bankrupt in his examination before the Commissioner expressly swears, that he would not have made any such arrangement with *Ladbroke & Co.*, as that of keeping a balance of 1000*l.* constantly in their hands, if he had not borrowed of them the sum of 4000*l.* The subject of the negotiation of the bankrupt with *Ladbroke & Co.* was not as to the continuation of the relation between them of banker and customer,—not whether the banking account between the parties should be continued,—but whether they would consent to grant the bankrupt a loan of money. Mr. *Gillman*, one of the partners in the house of *Ladbroke & Co.*, acknowledges that at the time of the negotiation for the loan, he had some conversation with the bankrupt, to the effect that it would not be worth while (a) for himself and his partners, unless the bankrupt kept with them an average balance

(a) Mr. *Gillman*, however, in a subsequent affidavit stated, that by this expression he did not mean that a loan at the full legal interest of five per cent., or that the loan in question would not be worth while for himself and his partners; but that by the word “it” he meant that the banking account generally of the bankrupt would not be worth their while, if an average balance of 1000*l.* was not kept on such account.

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Ex parte
PATRICK
and another.

of 1000*l*. In *Carstairs v. Stein*, and all that class of cases, the question has always been, whether the charge for commission was *bonâ fide* referable to the trouble of the banker, or agent, in transacting the business of the party to whom the money has been advanced. But the excess of legal interest bargained for in this case, could have no such reference. It was nothing more, nor less, than a stipulation by the bankers, that for an advance of 3000*l*., they should receive interest as on a loan of 4000*l*.

Mr. *Marshall*, on behalf of the official assignee, was then proceeding to address the Court; but

The COURT said, that the official assignee was neither a petitioner, nor a respondent, and therefore could not be heard on the merits of this petition.

Mr. *Montagu*, Mr. *J. Russell*, and Mr. *Wright*, for the respondents, were stopped by the Court.

ERSKINE, C. J.—I am of opinion, that the Commissioner has in this case come to a right conclusion. If it had been clearly shown, that the real intent of the parties to this loan was, that more than 5*l*. per cent. interest should be paid on the amount of the money agreed to be advanced, the Court would not have allowed the consequences of an usurious contract to be evaded by any pretence or device, that might have been set up to prevent those consequences attaching, serious as they are, to the lender of the money. But it appears to me, that the assignees in this case have not made out even a colourable argument, that the bankers stipu-

lated for the receipt of more than legal interest, on the loan in question. When the bankrupt applied to them to make him an advance of 4000*l.*, they agreed to do so, without any condition being attached to the loan, or any express stipulation as to his keeping a balance of 1000*l.* in their hands. The bankers say to him, "the least you can do is to leave a balance of 1000*l.* in our hands;" and the question is, whether this arrangement had reference to the trouble of managing the banking transactions, or whether it formed part of the consideration for the loan, and thus became a cloak for usury. Now, *Gillman* states expressly in his affidavit, that when he said it was not worth their while, unless the bankrupt kept with them an average balance of 1000*l.*, this expression applied to the banking account, and not to the loan. It appears, that the bankrupt, not having kept this balance in the bankers' hands, pursuant to the expectation he held out to them, sent them yearly a check for the difference of the interest on the balance. But these were voluntary payments, made by him as a present or compensation to the bankers, for keeping so small a balance with them. As to granting an issue, we must recollect, that the parties applying for it are the assignees, and that the costs of the trial would have to be paid out of the estate; and therefore unless it was clearly for the advantage of the estate, the Court would not think of granting an issue. But the facts are really so plain in this case, that an issue is quite an unnecessary proceeding.

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Ex parte
PATRICK
and another.

Sir J. Cross.—If there had been no relation between these parties but that of borrower and lender, and if nothing had passed between them but a mere loan of

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Ex parte
PATRICK
and another.

money from one to the other, then it might have been difficult to say, that the transaction in question was not usurious. For most unquestionably, if a party borrow 4000*l.*, agreeing to pay 5*l.* per cent. interest for the whole of that sum, and it is stipulated by the lender, that only 3000*l.* shall be actually advanced, and that the remaining 1000*l.* shall be left in his hands, this transaction, standing alone, would amount to usury. But in the present case, it appears to me, that the object of keeping always a balance of 1000*l.* in the hands of the bankers, was, to compensate them for their trouble in keeping the banking account. It is stated in evidence, that in one year the bankrupt paid in and drew for no less a sum than 108,000*l.* Are the bankers then to receive no remuneration for keeping so troublesome an account? Why, if the bankrupt had kept the whole of the balance of 1000*l.* in the bankers' hands, the interest would not have amounted to a compensation of one shilling per cent. for their trouble. And we have often heard, that 2*s.* 6*d.* per cent. has been held a reasonable allowance to bankers for trouble and commission. The bankrupt, however, did not keep this balance of 1000*l.* in his bankers' hands, and voluntarily sent them a check at the end of each year for the difference of the interest upon the balance. But this was intended as a *bonus*, or present, to make up for withdrawing a part of the balance of 1000*l.* I am therefore of opinion, that the whole transaction was *bonâ fide*, and free from any shift or device for usury.

Sir G. ROSE.—I am disposed to agree with my learned colleagues, that the Commissioner has in this case, under all the circumstances, arrived at a proper and a just conclusion. It must not be taken for granted, how-

ever, that because the relation of banker and customer exists between two parties, an agreement to make an undue allowance for the loan of money, would not amount to the offence of usury. My opinion is formed, not on the ground of this being a transaction between banker and customer, but from the peculiar circumstances of this particular case.

Mr. *Marshall* then asked for the costs of the appearance of the official assignee, as it was by the direction of the Commissioner, that he had instructed counsel to appear upon this petition.

The COURT said, that official assignees had, generally speaking, no business to appear on petitions of this description, but that if the Commissioner would certify to the Court, that he had actually directed the official assignee to appear on this occasion, he may in that case have his costs out of the estate.

Sir G. ROSE.—With reference to the case that was heard before us yesterday, involving a question of usury, I think it right to mention, that the case of *Ex parte Walker, in the matter of Petrie (a)*, which was decided by Lord *Eldon*, was very similar in its circumstances to the present, and the transaction was there held to amount to usury. In that case the bankrupt applied to *Noel, Templar, & Co.*, as bankers, to make him and his partners occasional advances, engaging that the bankers should never be at any time in advance for them above 3000*l.*, and that as long as they should be in advance, the bankrupt and his partners would keep a balance of 500*l.* at least in the bankers'

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Ex parte
PATRICK
and another.

April 19.

(a) Mont. Year Book for 1810.

1834.
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Ex parte
PATRICK
and another.

hands. Lord *Eldon*, in delivering his judgment, said; “whatever might be the custom of bankers, when no agreement was made, here was an express agreement which was the foundation of their dealings; this agreement is usurious.” Now if, in the present case, it had been an ingredient in the contract for the loan of the 4000*l.*, that a balance of 1000*l.* was to be always kept with the bankers, there could be then no doubt that the contract would have been usurious. It is certainly a very nice question, and the circumstances approach so near to those of *Ex parte Walker*, as to border on the very verge of usury. And if the Commissioner had found them too difficult to get over, and had decided the transaction to be usury, I confess that I, for one, should not have been dissatisfied with his decision. But as it was entirely a question of fact, and the Commissioner had all the facts before him, and after giving the case great consideration, has pronounced that the dealing between these parties was not usurious, I am not disposed to disagree with him in the conclusion he has come to in this matter.

ERSKINE, C. J.—My opinion was founded on this,—that the keeping a balance of 1000*l.* in the bankers’ hands formed no part of the contract for the loan, but was a voluntary agreement made afterwards by the bankrupt; and that the arrangement was made with reference to the banking account between the parties, and not to the loan.

Petition dismissed. The costs of all parties to be paid out of the estate (a).

(a) A similar point arose before Mr. Commissioner *Evans*, in the matter of *Smith*, on the 7th and 12th July 1834. Mr. *Solomonson*, a bill-broker, applied to prove on several bills which he had received from the bankrupt to

get discounted, and for which he gave the bankrupt only part of the value when they were left, retaining the remainder for several days, but charging discount on the whole, as well as a commission of 10*s. per cent.*—Mr. *J. Russell*, for the assignees, contended that this was usury.—Mr. *E. Chitty*, for the proof, referred to *Ex parte Gwyn*, 2 Dea. & Chit. 12, and *Ex parte Goss*, *id.* 241, as to the charge for commission ;—and as to the other point, he urged that as there was no previous agreement that any balance should be left in the broker's hands, and it was the usual mode of doing business, and was a matter of mutual convenience, the transaction was not usury.—Mr. Commissioner *Evans* admitted the proof.

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Ex parte
PATRICK
and another.

Ex parte GILES LADD.—In the matter of GEORGE RYLAND.

Ex parte THOMAS MOLE.—In the same matter.

*Southampton
Buildings,
March 3.*

THE first of these petitions came on by way of further directions, in pursuance of an Order made by this Court on the 27th January 1834, on the hearing of a former petition, whereby it was ordered, that the assignee of the estate of the bankrupt should, within a month from the date of the Order, elect whether he would adopt a certain agreement made between the petitioner and the bankrupt, for granting a lease to the bankrupt of a certain manufactory at Birmingham; and that the assignee should be at liberty to present in the meantime such petition as he should be advised, to be brought on for hearing with the petition for further directions.

The bankrupt agreed in writing to take a lease of a manufactory for a term of years, and the landlord agreed to erect at his own expense certain buildings, upon the bankrupt paying, as an additional rent, 7*l.* 10*s. per cent.* upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt, on the verbal assurance of the landlord, that the bankrupt might deduct the amount expended from the rent. The assignees elected

The second of the petitions above mentioned was accordingly presented by the assignee, stating that the assignee had elected not to adopt the agreement, and praying for a reference to ascertain what sum has been

not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum which the bankrupt had expended on the buildings. *Held*, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by the bankrupt.

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Ex parte
LADD.
Ex parte
MOLR.

expended by the bankrupt in the erection of certain sheds and buildings on the premises mentioned in the agreement,—that, after deducting the amount of the rent due to *Ladd* at the issuing of the fiat, he might be ordered to pay the balance to the assignee,—and that, until he made such payment, he might be restrained from entering upon the property, or taking any proceedings for the purpose of taking possession of it.

The facts of the case were these:—On the 7th November 1832, *Ladd* and the bankrupt entered into an agreement in writing, by which *Ladd* agreed to let, and the bankrupt to take, the premises in question from Midsummer day then last, at the rent of 60*l.*, in which agreement was the following clause:—

“ And the said *Giles Ladd* doth hereby agree with the said *George Ryland*, to grant and execute to him, at his request and expense, a lease of the said premises for any term not exceeding fourteen years, upon the conditions above mentioned. And also to build, at the expense of the said *Giles Ladd*, upon the said premises, any additional shops he the said *George Ryland* may require, upon his paying to the said *Giles Ladd*, as an additional rent, the sum of 7*l.* 10*s.* per cent. upon the amount to be expended by him in building such shops, which it is hereby agreed shall not exceed the sum of 500*l.*”

In pursuance of this agreement, the bankrupt entered into possession of the manufactory, and in February 1833 applied to *Ladd* to erect certain sheds and buildings for his workmen; but *Ladd* requested the bankrupt to erect them, saying that he might deduct the amount expended from the rent. The bankrupt accordingly erected these buildings at an expense, as

he alleged, of 100*l.* 13*s.*, which was a less sum than *Ladd* had agreed to expend in the erection of them. The assignees had applied to *Ladd* for re-payment of this sum, which he refused, on the ground that the buildings were not worth more than 20*l.*, and that no formal lease had yet been executed of the property.

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Ex parte
LADD.
Ex parte
MOLB.

It was stated by *Ladd*, in his affidavit, that the premises which he agreed to let the bankrupt were built expressly for the purpose of manufacturing pearl ash, and that the shopping erected by the bankrupt was built for the convenience of the bankrupt in his own trade of a fire-iron manufacturer. That after the erection of such shopping, an arrear of rent was due to *Ladd*, and upon his expressing his dissatisfaction at not receiving his rent, the bankrupt presented him with the bill for erecting the shopping, amounting to 100*l.*; that *Ladd*, immediately he saw the amount, exclaimed, it was an imposition; upon which the bankrupt said, "I was ashamed to show it to you, I thought it was too much; but I suppose the builder is trying to get something out of me, as he has lost so much by my brother."

Ladd therefore now prayed, on the petition for further directions, that the assignee might be ordered to give up the possession of the property, and also to pay the costs of these several petitions.

Mr. *E. Chitty*, in support of the petition for further directions, referred to the 75th section of the 6 *Geo.* 4. c. 16., which provides, that where any bankrupt is entitled to any lease, or agreement for a lease, if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing shall

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Ex parte
LADD.
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be entitled to apply by petition to the Lord Chancellor, who may order them so to elect, and to deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit. In *Ex parte Lucas* (a), this Court decided, that it had no jurisdiction to enforce the specific performance of an agreement for a lease; and that it could go no further, than call on the assignees to say whether they accepted or rejected the property,—and if they rejected it, to order them to deliver up the possession of it to the landlord. [*Erskine*, C. J. As the assignees have already elected, the question certainly is, whether they are not now bound to deliver up possession of the premises.] [Sir J. Cross. The assignees, undoubtedly, cannot insist upon the rights of the bankrupt, and abandon his duties.] The provision of the statute is more remedial to the bankrupt, than to the landlord; for the bankrupt is exonerated from all future liability for rent after the date of the commission, while the landlord loses his rent and his tenant; and, in this case, there is now a whole year's rent due to the landlord. The assignees must accept or reject the property, with all its advantages or disadvantages, and after rejecting it have no possible claim against the landlord. By the agreement between the parties, the landlord was to have an additional allowance of seven and a half per cent. in addition to the rent, if he had erected the buildings; and therefore the most the tenant could claim for erecting these buildings, instead of the landlord, would have been a similar allowance in deduction from the rent, in case the

(a) *Ante*, p. 144; 1 Mont. & A. 93; and see *Ex parte Bright*, 2 G. & J. 79; *Ex parte Warwick*, Buck, 326; *Ex parte Clunes*, 1 Madd. 76.

tenancy had continued. But the assignees in this case claim a lien on the buildings, for the whole amount of the 100*l.* expended by the bankrupt. There is no authority whatever for such a demand. No tenant can hold over the premises after the expiration of his term, because he has a claim against his landlord; and here the term is already determined by the act of the tenant himself, or rather of the assignees, who stand in his place. If the assignees have any claim against the landlord, their only remedy is by an action at law upon the agreement, and not by any lien on the property, in which they have disclaimed all interest.

Mr. *Archbold*, for the assignees. The bankrupt applied to his landlord to lay out money to the extent of 100*l.* in erecting these buildings, and it was his duty to do so, pursuant to the terms of the agreement. Instead of this, he gets the bankrupt to do it for him, and now wants to take all the benefit of these improvements, without making any compensation for them. If *Ladd* had laid out all the money he was bound to do in erecting these buildings, the property so improved would not have been abandoned by the assignees, but would have been retained by them for the benefit of the bankrupt's creditors. [Sir *J. Cross*. Have you not, by your own election, destroyed the relation of landlord and tenant, and have you any claim against the landlord, *quâ* landlord, now? The difficulty here is, how we can turn an usurped possession into an equitable right. Here you wrongfully keep possession, after having repudiated the lease.] The Court, having power to order the property to be delivered up to the landlord, has power also to make such an order condi-

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tionally, namely, that the landlord should make a reasonable allowance to the assignees for the amount of the money which the bankrupt has expended, in the improvement of the property that is ordered to be delivered up.

Mr. *E. Chitty*, in reply, was stopped by the Court.

ERSKINE, C. J.—The Court is of opinion, that there has been no case made out, on the part of the assignees, to justify them in detaining possession of this property, after having rejected the agreement for the lease. And we have come to this opinion, on the ground that there is no evidence whatever, that the landlord ever promised to repay the bankrupt the amount of what he might lay out in the erection of the buildings, but merely that he would allow him to deduct it from the rent. This plainly shows that the landlord contemplated a continuance of the tenancy. But here the assignees say, that they will not hold the property, as the tenants of the landlord. The terms of the agreement are, that *Ladd* shall build, at his expense, any additional shops that the bankrupt might require, upon his paying, as an additional rent, 7*l.* 10*s.* per cent. upon the amount expended. But there is no stipulation, whether the money was to be laid out, on the bankrupt accepting a lease of the property for any certain number of years. Taking the whole agreement together, I should construe it in this way—that if the bankrupt took the lease, and continued tenant of the property, the landlord would lay out this money in erecting the additional buildings. But the assignees have refused to take a lease, and the premises have

therefore become untenanted. Then, is the landlord to have this property thrown back upon his hands, and to be told besides, “you must repay the money, which the bankrupt has expended on it to suit his own convenience?” I think there is no foundation for such a claim on the part of the assignees, and that they must therefore give up possession of this property to the landlord, after having rejected all right to it as his tenants.

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Sir J. CROSS.—The keeping possession of premises, when the interest of the tenant is determined in them, is a trespass on the property of the lessor. In this case the assignees have no claim, either at law, or equity, to retain possession of these premises, or to have the money paid them, which they demand from the landlord. The agreement in itself contemplates a lease for a term of years; and the stipulation, that the landlord should lay out money in the improvement of the property, was only intended to be on condition, that the bankrupt took a lease of the premises. It seems to me, therefore, that the bankrupt has expended this money in erecting the buildings himself, in his own wrong. If he had continued solvent, he might no doubt have insisted on a lease. But it would be strange doctrine to hold, that because the tenant has laid out money on the premises to please his own fancy, the landlord must repay him this money, before he can resume the possession of his own property, when the lease has been declined by those who now represent the tenant.

Sir G. ROSE was absent.

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The Order was therefore, on the petition for further directions, that the assignees should forthwith deliver up possession of the property to the landlord,—and that the petition of the assignees should be dismissed; but without costs on either petition.

Ex parte EMMERTON and others.—In the matter of
KINGSFORD.

Westminster,
April 19.

A memorandum in writing drawn up entirely by the clerk of an equitable mortgagee, and which was not signed by the bankrupt, is not sufficient to exempt the mortgagee from paying the costs of the petition for the sale.

THIS was a petition of certain bankers, for the sale of an equitable mortgage. The only peculiar circumstance attending it was, that the memorandum of the deposit of the title deeds was not written or signed by the bankrupt, but was drawn out by a clerk of the bankers, when he left the deeds at the banking house.

Mr. ———, for the petition, submitted that the clerk might be considered the bankrupt's agent *pro hac vice*; but

The COURT thought that the memorandum of deposit, being entirely in the hand-writing of the clerk of the depository, it was not sufficient to take the case out of the general rule, which requires a memorandum in writing to accompany the deposit of deeds by way of equitable mortgage; and they therefore refused to allow the petitioners their costs.

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Ex parte HAWLEY.

Westminster,
April 19.

MR. CHING applied to the Court, by motion, to disallow a special case, which had already been certified by the Chief Judge to the Lord Chancellor, on the ground of the delay of the other party in proceeding with it. The original petition, on which the case was granted, was dismissed with costs.

After a special case has once been certified by the Chief Judge, the Court has no jurisdiction to disallow it.

Mr. Anderdon appeared for the assignees.

Mr. Bagshawe, for another party interested.

ERSKINE, C. J.—Our only jurisdiction, in the present state of the proceeding, is to make the party pay the costs, unless he proceeds with the special case.

Motion refused; but costs reserved.

Ex parte **MARY HOOPER** and another.—In the matter of **JOHN WEST**.

THIS was a petition to prove a debt, which had been rejected by the Commissioners, under the following circumstances.

The bankrupt, previous to his marriage, on the 22d August 1799, entered into a bond for 1100*l.* to certain trustees, which, after reciting that he was to receive the sum of 550*l.* as a marriage portion with her, was thus conditioned: “That if the said marriage should

Same day.

The bankrupt, having received 550*l.* with his wife on his marriage, gave a bond to trustees conditioned for the payment of 1100*l.*, “on receiving notice from the trustees.” *Held*, that although no notice was given to the bankrupt

before his bankruptcy, this was nevertheless a contingent debt provable within the provisions of the 56th section of 6 *Geo.* 4. c. 16.

The rule, of not allowing costs to a party appealing against the judgment of the Commissioners, will be relaxed in favour of a petitioner, establishing a clear and indisputable right of proof, which the Commissioners had rejected.

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take effect, and the said *John West* should receive the sum of 550*l.*, as and for the marriage portion of the said *Joannah Taunton*; then, if he the said *John West*, his heirs, executors, or administrators, should, after the expiration of three months from the celebration of the said intended marriage, *on receiving notice from the said Robert Hooper, and Thomas Harvey, for that purpose*, well and truly pay, or cause to be paid, unto them, or the survivors of them, or the executors or administrators of such survivor, the full sum of 1100*l.* of lawful money of Great Britain, upon the trusts thereafter mentioned,"—which were the usual trusts in a marriage settlement, namely, the interest to be paid to the bankrupt for his life, and after his death to his wife for life, and after her death for the children,—“but in case the said *John West* should depart this life, before the said sum of 1100*l.* should be paid to the said trustees, then if the heirs, executors, or administrators of the said *John West* should, within three months next after his decease, pay, or cause to be paid, unto the said trustees the sum of 1100*l.* for and upon the trusts, intents, and purposes thereinbefore mentioned, expressed, and declared, of and concerning the same; then the said obligation to be void and of none effect, or else to remain in full force and virtue.”

The marriage was shortly afterwards duly had and solemnized, and there were eight children of the marriage, some of age, and some who had not yet attained the age of twenty-one years. The sum of 550*l.* was duly received by the said bankrupt, but he never paid the sum of 1100*l.* to the trustees, or to the petitioners, who were the executrix and executor of the surviving trustee.

On the 7th July 1831, a commission of bankrupt issued against *John West*; and on the 26th August 1831, the petitioners applied to prove for the sum of 1100*l.*, but the Commissioners refused to receive the proof, on the ground that notice had not been given to the bankrupt by the trustees to pay the money, so as to make it provable as a present debt under the commission. On the 25th September 1832, the bankrupt died.

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Mr. *Swanston*, and Mr. *Stinton*, in support of the petition, cited the cases of *Ex parte Myers* (a), *Ex parte Fairlie* (b), and *Ex parte The Lancaster Canal Company* (c); as to there being no necessity for any demand in this case previous to the bankruptcy, in order to found the right of proof. [Sir J. Cross also referred to *Ex parte Tindal* (d), and *Ex parte Grundy* (e).] They were then stopped by the Court.

Mr. *Twiss*, and Mr. *Montagu*, for the assignees. The condition of the bond is, that if the bankrupt should, after the expiration of three months from the celebration of the marriage, “on receiving notice from the trustees for that purpose,” pay the 1100*l.* This sum therefore could not be demanded of the bankrupt, until after notice given to him by the trustees, and no notice was given to him previous to the bankruptcy. In *Ex parte Elgar* (f),—where money was lent on the following note “I promise to pay Mr. E., or order, after three months’ notice, 150*l.*, together with interest due thereon, at five per cent.,” and after payment of

(a) 2 Dea. & Chlt. 251.

(c) Mont. 27.

(e) Mont. & M. 293.

(b) Mont. 17.

(d) 8 Bing. 402.

(f) 2 G. & J. 1.

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two years interest, but before any notice given, the maker of the note became bankrupt,—Lord *Eldon* expressed great doubt whether the debt was provable, as no notice had been given to the maker of the note before his bankruptcy, and founded his judgment simply on the payment of interest on the note, which he considered as evidence that the parties had dealt with the note as an immediate debt. The payment of interest (a), in that case, was therefore held to be equivalent to notice. In *Ex parte Fairlie* (b) the point was, not that no demand was necessary to render the debt in that case provable,—but that a demand was necessary, where a note or bond is given by a surety, or any party, who stipulates for notice. The only other case, that bears materially on the point, is *Clayton v. Gosling* (c), where a note had been given in the following terms: “On having twelve months’ notice, we jointly and severally promise to pay Mr. J. C., or order, 200*l.*, for value received, with lawful interest;” no notice was given, nor did any interest appear to have been paid; but the debt was held to be provable, because the words “value received,” imported value received from the payee, and therefore constituted an immediate debt. Mr. Justice *Bayley*, however, said in that case, “If interest had not been payable from the date, but from the notice, then, as notice had not been given at the time of the bankruptcy, the amount of the sum to be paid might have been doubtful; but as interest is payable from the date of the note, no such difficulty arises.” Lord *Tenterden* also, in delivering

(a) And see *Ex parte Sparling*, 1 C. B. L. 159; *Ex parte Downman*, 2 G. & J. 241.

(b) Mont. 17.

(c) 5 B. & C. 360.

his judgment in that case, says; "this note was made payable at a time which we must suppose would arrive." But here the payment of the bond is in the alternative, and therefore it was not certain, whether the time for payment of it would ever arrive. [*Erskine*, C. J. The last clause of the bond provides, that in case of the bankrupt's death before the money was paid to the trustees, then, that his executors should, within three months next after his decease, pay to them the money.] [Sir *J. Cross*. You are contending, that the giving of the notice is an ingredient to constitute the debt.] The question is, whether this is *debitum in præsentì, solvendum in futuro*, or a contingent debt within the meaning of the 6 Geo. 4. c. 16. s. 56. If time was merely an ingredient as to the payment of this money, then no doubt it would be a contingent debt. But we contend, that the contingent clause in the statute has no application to this case. The intention of that clause was to protect creditors, whose right to payment depended on a contingency arising out of the acts of others, or on circumstances over which the creditors had no control; but not to a case like this, where the contingency depended on the act of the creditor himself. For the legislature could never mean to encourage a party to lie by dormant, and neglect all vigilance in perfecting his claim.

The cases are uniform in deciding, that when a sum is not payable until notice has been given to the party contracting to pay it, and that party becomes bankrupt before any notice has been given, either express or implied, it is not a provable debt under his commission; *Uttersen v. Vernon* (a), *Ex parte Mare* (b), *Nicholls v. Bromley* (c).

(a) 4 T. R. 570.

(b) 8 Ves. 335.

(c) 2 Brod. & B. 464;

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Mr. *Swanston*, in reply, was stopped by the Court.

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ERSKINE, C. J.—If the case of *Clayton v. Gosling* (a) had never been decided, and the 6 Geo. 4. c. 16. s. 56. had never been passed, then I should have thought that there might have been some doubt in the present case, from what Lord *Eldon* said in *Ex parte Elgar* (b); though, even there, it was only a doubt thrown out by him, whether the debt was provable, and does not amount to an express decision on the point. But in the more recent case of *Clayton v. Gosling*, the point was expressly decided, that a debt of this nature was provable under a commission. Lord *Tenterden* says, in that case:—"The note in question," which was a note payable with interest twelve months after notice, "may be read thus, 'We acknowledge to owe the payee 200*l.*, and promise to pay him that sum, with interest, twelve months after notice.' If so, there is not any contingency as to the debt, for that is admitted to be due. Nor is the time of payment contingent, in the strict sense of the expression, for that means a time which may or may not arrive; this note was made payable at a time, which we must suppose would arrive." If that is sound reasoning in *Clayton v. Gosling*, does it not apply to this case? What difficulty is there in putting a value on a debt in a sum certain, payable the moment that notice is given to the party who is bound to pay? But we are relieved from that difficulty, even supposing it to exist, by the very words of the 56th section of the 6 Geo. 4. c. 16; which declares, that if the bankrupt shall have contracted any debt payable on a contingency, which shall not have happened

(a) *Suprà.*(b) *Suprà.*

before the issuing of the commission, the person with whom the debt has been contracted may apply to the Commissioners to set a value *upon such debt*, and the Commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained." The Commissioners are therefore required to set a value *on the debt*, not on the happening of the *contingency*. This removes all reason for the doubt expressed by Lord Eldon in *Ex parte Elgar*.

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 and another.

Sir J. Cross.—It appears to me, that the only question in this case is, whether this was a debt owing by the bankrupt before the bankruptcy. The condition of the bond recites, that the bankrupt was to receive the sum of 550*l.*, the wife's money, and in consideration of this sum, he has bound himself to pay to the trustees 1100*l.* as soon as they should demand it, after the expiration of three months from the celebration of the marriage. Now does this stipulation relate to the constitution of the *debt*? No, clearly not, but to the day of payment; the debt is perfect, the payment is alone postponed. I think the debt is even provable under the 51st section of the statute, as credit was given to the bankrupt upon valuable consideration for money, which did not become payable when the bankrupt committed an act of bankruptcy. But if any doubt existed as to its being provable under the 51st section, there can be none as to the right of proof under section 56. In my opinion, the bankrupt contracted a debt the moment he executed the bond to the trustees.

Sir G. Rose concurred with the rest of the Court;

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and thought that the costs of all parties should come out of the estate.

Mr. *Twiss*, and Mr. *Montagu*, objected to this part of the order, as the invariable practice has been, not to allow costs to a petitioner, although he succeeds on the petition, when he appeals against the judgment of the Commissioners, if they have come to a deliberate judgment on the question. In *Ex parte Millington* (a), the Court said that the general rule, of not giving costs against the decision of the Commissioners, was not to be broken in upon. Now the Commissioners in this case rejected the proof, and the assignees were bound to support their judgment. The only question is, whether the Commissioners have fairly exercised their judgment.

ERSKINE, C. J.—In *Ex parte Millington* the Commissioners rejected a doubtful debt; here the debt is not doubtful, and therefore the proof of it ought not to have been resisted by the assignees in the first instance. As they have forced the petitioners to come here, I think it is proper, when the justice of the case is so clearly with the petitioners, that they should not be burdened with the costs. The general rule is a very good one, but every general rule has its exceptions.

Sir J. CROSS.—I think this proceeding on the part of the respondents' counsel is altogether irregular. By the statute (b), on which the jurisdiction of this Court is founded, it is expressly provided, that all costs of suit shall be in the discretion of the Court. And now

(a) *Ante*, p. 298.

(b) 1 & 2 W. 4. c. 56. s. 5.

Mr. *Montagu* says, because a former case, under very peculiar circumstances, was decided so and so, the decision is to take away entirely all the discretion, with which the Court has been invested by the legislature on the subject of costs.

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and another.

Sir G. ROSE.—According to my experience, the practice has uniformly been, that the Court will always exercise its discretion as to the costs, when they are to come out of a fund; although it may feel bound by a general rule, when the question, who shall pay them, lies between two individuals. Now in bankruptcy proceedings the estate is that fund, over which this Court has a discretionary power in all questions of costs. The general rule in bankruptcy is, certainly, that a party succeeding against the judgment of the Commissioners must pay his own costs; but I am glad, that the Court feel justified in occasionally relaxing that rule. For it appeared to me to be monstrous, that a creditor is to be put to the expense of coming to this Court, in order to establish a clear right of proof, which has been improperly resisted by the assignees, when the judgment of the Commissioners turns out to be erroneous. How could there, for one moment, have been a doubt on this point before the Commissioners? The assignees ought not to have driven the party to come to this Court for redress; and therefore it is perfect justice in this case to depart from the general rule.

ORDER made as prayed.—Costs of all parties to come out of the estate.



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Westminster,
April 22.

Ex parte LUCAS.—In the matter of OLDHAM.

When a petition is dismissed with costs, the Court will not limit the payment of the costs, merely, as to the affidavits that were read on the hearing of the petition; for, in general, all affidavits filed are entered as read.

MR. SWANSTON, and Mr. Stinton, on the part of the petitioners, moved that the minutes of the Order pronounced by the Court on the hearing of this petition (a) might be amended, by striking out the words, "and the several affidavits filed in support thereof, and in opposition thereto," and inserting in their stead the following words, namely, "the several affidavits filed in this matter, *that were read to this Court* on the several times when the said petition was heard." The petition was dismissed with costs, to be paid by the petitioners. But the case having been argued as on a demurrer, no affidavits were in fact read, and it was quite unnecessary that they should be read, on the hearing of the petition. There ought, therefore, to be a qualification in the terms of the Order in this respect; for it is reasonable, that the costs only of those affidavits, which were actually read, should be allowed. This is the practice in Courts of Equity. The Master, in his Report to the Lord Chancellor, always specifies the affidavits that were read in any proceeding before him; and those only are permitted to be read, or to be allowed in the costs, when the case afterwards comes on for hearing before the Lord Chancellor.

ERSKINE, C. J.—I understand from the officer of the Court, that the practice is invariably to draw up the Order in the present terms.

(a) See *ante*, p. 144.

Sir G. ROSE.—Unless some special exceptions are taken at the hearing of a petition, all affidavits that have been duly filed are entered as read.

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Ex parte
LUCAS.

Motion refused.

Ex parte WYATT.—In the matter of WYATT.

THIS was a petition of a creditor to annul the fiat, on the ground that the bankrupt was not a trader, and that the fiat was issued for the purpose of defeating the rights of the petitioner in obtaining payment of his debt, which amounted to £2000. and upwards, for money lent. The fiat issued against the bankrupt in January 1883.

Mr. Arnold, for the surviving assignees, took a preliminary objection to the hearing of the petition, on the ground, that by a former order made in this matter, the costs of the day were ordered to be paid by the petitioner, and had not yet been paid by him.

The Court thought that there ought to have been a personal demand for the costs, to entitle the assignees to support this objection, the same as is required on a motion for an attachment against a party for non-payment of costs.

Mr. Stannison, and Mr. Wright, who appeared for the petitioning creditor's personal representative, took another preliminary objection, viz. that the petitioner was

debt is not a preliminary objection, although he is bound to prove that he is legally a creditor.

Westminster,
April 22.

Where a creditor petitions to annul a fiat after the bankrupt has obtained his certificate, there must be a distinct allegation of fraud against the bankrupt in the petition; it is not sufficient to state fraud in the affidavit.

A creditor cannot petition to supersede, who has lain by twelve months after the issuing of the fiat, without assigning some good reason for the delay.

To support an objection to the hearing of a petition, on the ground of the costs not having been paid by the petitioner, as directed by a former order, there must have been a personal demand of the costs.

Where a party petitions, *quod* creditor, an objection to the validity of his

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Ex parte
WYATT.

not in effect a creditor, as it appeared on the face of the petition, that the debt he claimed was tainted with usury. The practice is, to dispose of a preliminary objection of this nature, before the petition is heard, in order to save the time of the Court, as well as to prevent a party from harrassing others, against whom he has no right to institute proceedings; *Ex parte Fowles* (a). So in *Ex parte Hudson* (b), where a petition to supersede was presented by a creditor, whose debt was objected to on the hearing of the petition, on the ground of its being usurious, it was held, that the validity of his debt must be established, before the Court proceeded on his application to inquire into the validity of the commission. No party is entitled to be heard on a petition to supersede, who is not a creditor. And the same practice prevails in Courts of Equity; for on a bill for an account against an executor or administrator, the plaintiff must make out satisfactorily that he has a lawful debt, otherwise the Court will dismiss the bill.

The COURT thought, that the objection raised as to the validity of the debt was not strictly a preliminary objection, but that the petition ought, in the first instance, to be opened; after which the petitioner was of course bound to make out that he was a creditor, for he would not otherwise have a right to petition.

Mr. *Montagu*, who appeared for the bankrupt, then urged another preliminary objection to the hearing of the petition, which was, that the bankrupt had obtained his certificate no less than a twelvemonth back; and it

(a) Buck, 98.

(b) 2 Rum. 456.

was decided in *Ex parte Crowder* (a), that the requisites to support a commission cannot be disputed, after the bankrupt has obtained his certificate, without an allegation of fraud in the petition to supersede.

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WYATT.

Mr. *Twiss*, and Mr. *E. Chitty*, in support of the petition, submitted that there was in substance a complete charge of fraud against the bankrupt in the petition; for it stated, that the fiat was issued for the purpose of defeating the rights of the petitioner in obtaining payment of his debt; and the affidavits in support of it distinctly charged the bankrupt with having fraudulently concocted a trading, for the purpose of being made a bankrupt, and obtaining a discharge from his debts by means of his certificate.

The COURT said, that where a bankrupt has concocted a fraudulent bankruptcy, to get discharged from his debts, his certificate is no objection to a petition by a creditor to supersede the commission. This is no doubt recognized in various cases (b). But the only statement in this petition, implying fraud, is, "that the fiat *was issued* for the purpose of defeating the rights of the petitioner in obtaining payment of his debt." If any one therefore was to be charged with fraud on this allegation, it would be the petitioning creditor, and not the bankrupt. But there is no fraud in a petitioning creditor issuing a fiat, in order to prevent another creditor from obtaining payment of his debt, to the exclusion of the other creditors,—unless there is evidence of col-

(a) 2 Rose, 324.

(b) *Ex parte Gillman*, 2 Cox, 193; *Ex parte Poole*, *ibid.* 230; *Ex parte Moule*, 14 Ves. 602.

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lusion with the bankrupt. As to the charge of fraud being established by the affidavits, the office of affidavits is to support the allegations of the petition, and they cannot be had recourse to, to supply an absolute want of a necessary allegation. If the omission of a charge of fraud, however, were the only objection to this petition, the Court might probably have permitted it to stand over, for the purpose of being amended. But as the petitioner has lain by from January 1833, when the fiat issued, a period of more than twelve months, and no reason whatever has been assigned for the delay, the petition must be dismissed. For you cannot supersede, as against the assignees and the petitioning creditor, unless you can supersede as against the bankrupt.

Petition dismissed with costs.



Ex parte SOMERVILLE and others.—In the matter of
LOScombe.

Westminster,
April 22, and
May 7.

The common bargain and sale from the Commissioners to the assignees passes an estate tail, of which the bankrupt was seized at the time of his bankruptcy.

Quære, therefore, where the bankrupt was seized of an estate tail, which he represented as an estate in fee simple, and died

THIS was the petition of the surviving executors of a mortgagee of an estate of the bankrupt's, praying that the Commissioners might be directed to execute a proper conveyance of it to a purchaser.

It appeared, that the commission issued against the bankrupt on the 17th June 1783, and that he was tenant in tail of the estate in question, which he had mortgaged before his bankruptcy to his partner, stating that he was tenant in fee simple, and having also repre-

before the estate was sold under his commission, whether there is any necessity for the Commissioners executing a special conveyance to the purchaser,—and what would be the effect of such a conveyance, thus executed after the death of the bankrupt?

presented the same to the Commissioners. In 1796 the bankrupt died, and on the 15th April 1826 a renewed commission issued, under which fresh assignees were duly chosen; and in 1827 the common bargain and sale was made to the assignees, on the supposition that the bankrupt was tenant in fee simple of the property in question. In 1833 the mortgaged premises were sold under the usual order of the Commissioners, and produced not more than a fourth of the sum for which they were mortgaged. The purchaser contended, that the property, being entailed, did not vest in the assignees by the common bargain and sale, and insisted on a special conveyance from the Commissioners, under the 65th section of the 6 Geo. 4. c. 16. The Commissioners declined to execute this conveyance, thinking that it could not have the effect of barring the issue in tail; because the conveyance to the purchaser would not be executed until after the death of the bankrupt, and the statute speaks of a seisin by the bankrupt, at the time when a conveyance is executed, to bar an entail, and has no retrospective words. And they certified this opinion, accompanied by the following commentary.

“In the case of *Pye v. Danbury* (a), and also in the case of *Edwards and Appleby* (b), it does not appear that the bankrupt died before the bargain and sale was executed, and in each of these cases the decisions were, as to the first, in favour of the trustees,—and, as to the second, in favour of the mortgagees, on the ground that there was a covenant for further assurance, by which the estate in each case was bound. But, in the present

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(a) 3 Bro. C. C. 695.

(b) 2 Ibid. 652.

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case, though there is a covenant for further assurance, yet we think it would bind only the bankrupt, and his general heirs, and not the issue in tail after the death of the bankrupt; and we infer from the case *Beck v. Welch* (a), that the death of the bankrupt, before the execution of a conveyance to bar the estate tail, would, upon the reasoning there held, put an end to the mortgagee's title. It may also be observed, that the provisions of the recent statute (b), for abolishing fines and recoveries, are confirmatory of the opinion above expressed; inasmuch as a disposition by the Commissioners of the estate tail of the bankrupt is, in the case of its being executed in the lifetime of the bankrupt, made to operate as a bar not only as against the issue in tail, but also against those in remainder and reversion; whereas, if executed after the decease of the bankrupt, its operation is limited to the issue in tail; by which it appears that the legislature contemplated a material distinction between the two cases, not provided for by any previous act of parliament.

Mr. *Swanston* appeared in support of the petition. By the 65th section of the 6 Geo. 4. c. 16., the Commissioners are directed, by deed indented and inrolled, to make sale for the benefit of the creditors of any lands, tenements, and hereditaments, whereof the bankrupt is seized of any estate tail in possession, reversion, or remainder; and it then declares, "that every such deed shall be good against such bankrupt and the issue of his body, and against all persons claiming

(a) 1 Wils. 276.

(b) 3 & 4 Will. 4. c. 74. sections 55 to 73. See ante, vol. ii. 651.

under him after he became bankrupt, and against all persons whom the said bankrupt by fine, common recovery, or any other means, might cut off, or debar from any remainder, reversion, or other interest in or out of the said lands, tenements and hereditaments." This conveyance directed by the statute will therefore pass not only what estate tail the bankrupt was seised of in possession at the time of his bankruptcy, but also what he was then seised of in reversion or remainder, and the possession of which he may have acquired since his bankruptcy. If the bankrupt had been still living, there would have been no difficulty in the Court making the order prayed for by this petition; for the issue in tail would have no right, during the lifetime of his ancestor, to come here and oppose such order being made. And notwithstanding the bankrupt's death, all difficulty is equally removed by the provisions of the 6 *Geo.* 4. c. 16.; for the 26th section of that statute enacts, that "if any bankrupt shall die after adjudication, the Commissioners may proceed in the commission, as they might have done if he were living." In this case, however, the bankrupt having died before the passing of the 6 *Geo.* 4. c. 16., the question arises, whether this section has a retrospective effect. There could be no doubt, if the words were, "shall die, *or shall have died.*" But, as the 26th section is a re-enactment in a compressed form of the provision contained in the 17th section of the repealed statute of 1 *Jac.* 1. c. 15., it is, according to the general rules and principles adopted in constructing statutes (*a*), retrospective in its operation. The 17th section of the statute of *James* enacts, "that if, after

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(*a*) See *Ex parte Grundy*, Mont. & M. 293.

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any commission of bankrupt hereafter sued forth and dealt in by the Commissioners, the offender happen to die before the Commissioners shall distribute the goods, lands, and debts of the offenders, or any of them, by force of the aforesaid statute of the 13th year of the reign of our late sovereign lady queen *Elizabeth*, and this statute, or either of them, that then nevertheless the said Commissioners shall and may, in that case, proceed to execution, in and upon the said commission, for and concerning the offender's goods, lands, tenements, hereditaments, and debts, in such sort as they might have done, if the party offender were living."

Now, according to the doctrine contained in *Billinghurst* (a), in the notice he takes of this provision in the statute of *James*, the Commissioners are clearly authorized to convey the bankrupt's property after his death, as effectually as they might have done in his lifetime. He says, "It is made by Mr. *Stone* a query in his lecture, that if there be two jointly seised, and the one become bankrupt, and die, whether his part shall be sold, because the survivor is not in by him. But it seems to me, that the bankrupt's part shall be sold, and that there shall be no survivor in the case; *first*, because the bankrupt's moiety is bound by the statutes by his becoming a bankrupt; *secondly*, the bankrupt had power to sell the same in his lifetime, and might depart with it, and so within the words of 13th *Eliz.* c. 7. 'Such use, interest, right, or title, as such offender or offenders that shall have in the same, which he or she may lawfully depart withal;' *thirdly*, by 1 *Jac.* 1. c. 15., the Commissioners, after the bankrupt's

(a) Judge's Resolutions on the Statutes concerning Bankrupts, p. 111, edition of 1770.

death, may proceed in execution in and upon the commission, for and concerning the offender's lands, tenements &c. in such sort as if the offender had been living; which they cannot do in the case before, if the survivorship took place."

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In the case of *Doe d. Spencer v. Clark* (a), a question having arisen, whether the interest of the bankrupt, in certain copyhold lands, of which he was seised in his lifetime, was an estate tail, or a fee simple conditional, it was held to be the latter. And, although Mr. Justice *Bayley* and Mr. Justice *Hobroyd* said it was not necessary to determine in that case, whether an estate tail of the bankrupt could be divested by a bargain and sale executed by the Commissioners after his death; yet, the Court held, that the Commissioners could pass his interest in this fee simple conditional, by executing the common bargain and sale after his decease. The special power of the Commissioners, as to the conveyance of the estates tail of bankrupts, was first given them by the 21 Jac. 1. c. 19. s. 12. [Sir *J. Cross*. Must not the whole question be determined by that statute?] The 6 Geo. 4. c. 16. is the statute, under which every act must now be done by the Commissioners, as all the former statutes are repealed. In *Jervis v. Tayleur* (b), where a joint commission had issued against a tenant for life, and a tenant in tail in remainder, it was held that the interest of both were passed by the common bargain and sale from the Commissioners to the assignees, so as to vest the life estate in them, as well as a base fee in remainder. Should the Court, however, entertain any doubt upon the present question, then the creditors of the bank-

(a) 5 B. & Ald. 458.

(b) 3 B. & Ald. 557.

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rupt ought to have the benefit of such doubt, according to the provision of the 135th section of the Bankrupt Act, which declares expressly that the act shall be construed beneficially for creditors.

Mr. *Montagu*, who appeared on behalf of the Commissioners, said that they were quite willing to do any thing in this matter, which the Court thought proper; but suggested a doubt, whether the Court could make any order on this petition, as the bankrupt's issue in tail was not before the Court. There was also another difficulty in the case, namely, whether the Commissioners could convey to any other persons, than the assignees. For in *Moult v. Massey (a)*, it was decided, that a provisional assignee could not convey the bankrupt's estate back to the Commissioners, in order that they might convey it to the assignees chosen under the commission; but that the provisional assignee must strictly follow the directions of the statute, and convey it from himself immediately to the chosen assignees. So, in the present case, it would seem that the intent of the statute was, that the bargain and sale of any estate tail of the bankrupt should be made by the Commissioners to the assignees, and not to any third person (b). The effect of the common bargain and

(a) 1 B. & Adol. 636.

(b) The case of *Moult v. Massey* depended upon the construction of the 6 Geo. 4. c. 16. s. 45., which directs the provisional assignee to "deliver up and assign all the estate of the bankrupt come to his possession to the assignees so chosen, &c." and therefore, although it has not prescribed the form of the conveyance, it has prescribed the parties, namely, those by whom, and to whom, the conveyance should be made; and the same express directions are given by the 63d section, with respect to the general assignment of the bankrupt's estate and effects,—and also by the 64th section, with

sale from the Commissioners to the assignees, is, to pass merely actual legal rights, and therefore only operates to pass what the bankrupt himself could have passed by a bargain and sale, namely, an interest during his own life. Here, the estate being an estate tail, and the bankrupt being dead, the Commissioners think they are not justified in executing such a conveyance of this property, as the petitioner requires. They cannot convey an estate, if they have no title to it; but, to show their willingness to do so, if they have that title, they are quite ready to lay a case before any eminent conveyancer, and to be guided by his opinion.

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ERSKINE, C. J.—The language of the 26th section of the 6 Geo. 4. c. 16. is clearly prospective in its meaning; the words are, “if any bankrupt *shall* die after adjudication.” Now the bankrupt was already dead, when that act passed. In the case of *Doe v. Clark (a)*, which has been already cited, Mr. Justice *Holroyd* draws a distinction between the facts of that case, and where a bargain and sale is executed by the Commissioners after the death of the bankrupt, in a case where during his life he had been seised of an estate tail; and he added, that it was not necessary in that case to determine what would be the effect of such a bargain and sale. After the intimation, however, which has been thrown out, of the intention of the assignees to take the opinion of an eminent convey-

respect to the common bargain and sale of the bankrupt's real estate. But the 65th section, which relates to estates tail, does not prescribe the party to whom the conveyance of the *estate tail* is to be made, but says, in general terms, that the Commissioners shall “make sale, for the benefit of the creditors, of any lands whereof the bankrupt is seised of an estate tail.”

(a) *Suprà*.

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ancer on the subject, the Court thinks it better to refrain, for the present, from making any order on this petition.

May 7.

The petition being called on again this day, the judges delivered their opinions as follows.

ERSKINE, C. J.—I am of opinion, that the bargain and sale, which the Commissioner has already executed to the assignees, vested in the assignees every species of freehold interest of the bankrupt, which the Commissioners are empowered to convey. In the two cases referred to by the Commissioners, of *Pye v. Daubuz* (a), and *Edwards v. Appleby* (b), there was nothing more than the common bargain and sale to the assignees; and yet it does not appear that either Lord *Northington* in the one case, or Lord *Thurlow* in the other, felt any difficulty on that account. It appears to me, that the Commissioners can do no harm by joining in the special conveyance to the mortgagee; but we ought not to order them to do so, unless the Court is satisfied that they have refused to convey some part of the bankrupt's estate, which they are expressly bound to convey by the provisions of the Bankrupt Act.

Sir J. CROSS.—The bargain and sale from the Commissioners to the assignees conveys, in general terms, all the freehold property of what nature or kind soever, which the bankrupt had, or possessed, at the time of his becoming bankrupt. Then the words of the 65th section of the 6 Geo. 4. c. 16., as to estates tail, are, "that

(a) 3 Brown C. C. 595.

(b) 2 Id. 652.

the Commissioners shall, by *deed indented and inrolled, make sale, for the benefit of the creditors*, of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof the bankrupt is seised of any *estate tail in possession, reversion, or remainder*." Now, as this section does not point out any particular mode of conveying the bankrupt's estate tail, except *by deed indented and inrolled*,—and as the Commissioners have already, by deed indented and inrolled, made sale of *all the freehold estates* of which the bankrupt was seised at the time of his bankruptcy, it appears to me that there is no necessity for a separate bargain and sale of an estate tail.

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Sir G. ROSE.—I confess, that I should feel no difficulty, if I were one of the Commissioners, in executing the conveyance which is asked by these petitioners; as it might perhaps place them in a better situation to enforce their legal rights against the purchaser. But I am, nevertheless, of opinion, that there is really nothing now for such a conveyance to operate upon; as I think the former bargain and sale has already passed every portion of the bankrupt's freehold property, which the statute authorizes the Commissioners to convey. It might indeed become a question, whether the better course to pursue altogether, would not be to vacate the existing bargain and sale, and execute a fresh one, that might be framed so as to meet the peculiar circumstances of this case, and not disturb any title that may have accrued under the first. Upon the present petition, however, it is unnecessary to make any order. It may be merely intimated to the Commissioners, that they

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may execute the conveyance, if they please; and that if the Commissioners desire an order for their protection, the Court would not refuse to make one, all parties consenting.

No Order made; costs of both parties out of the estate.

Westminster,
April 29.

Ex parte CARTER.—In the matter of WOLMAN.

If more than the statutable fees are taken by the Commissioners, they are perpetually disqualified from acting under any future fiat.

Two travelling fees, for attending two meetings on the same day, under the same bankruptcy, are beyond the fees allowed by the statute.

THIS was a petition of two of the assignees, and all the London creditors of the bankrupt, complaining of the conduct of the Commissioners, and praying that another fiat might be issued and directed to other Commissioners. It appeared that the present fiat was issued in August 1833, and was directed to Commissioners in Dorsetshire. At the first meeting the Commissioners sat from two o'clock till half-past four, when they adjourned to six the same evening, without any necessity (as the petitioners alleged) for these two meetings, for which the Commissioners were paid 12*l*. for their fees. On the 20th September another meeting was held, when the Commissioners adjourned at half-past twelve o'clock till half-past one. There was another meeting on the 11th December, when the Commissioners adjourned from seven o'clock in the evening until half-past eight the same evening; which last sitting was also adjourned until nine o'clock in the morning of the following day, when the Commissioners again met, and adjourned it to another period of the same day. For their sittings on these two days, the fees paid to the Commissioners amounted to no less a sum than 34*l*.

The petitioners therefore submitted, that the Commissioners had, by receiving these exorbitant fees, disqualified themselves from acting as Commissioners, under the provisions of the 6 *Geo.* 4. c. 16. s. 22 (a).

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In answer to the allegations contained in the petition, the Commissioners filed several affidavits, in which they stated that at the first meeting alluded to, they adjourned the meeting, at the request of the creditors who were then present, and for their convenience; which adjourned meeting lasted four hours. That on the adjourned meeting of the 20th September, they sat from half-past six till half-past nine; and that on the 21st September they sat from nine o'clock until half-past twelve; when the balance-sheet of the bankrupt not being ready for the purpose of completing his last examination, this meeting was also necessarily adjourned. That the meeting on the 11th December was the audit meeting, which always consumes much time, if the Commissioners examine properly the accounts of the assignees, and that upon this occasion it was impossible to investigate them properly at one sitting. There were also affidavits filed by two other

(a) By 6 *Geo.* 4. c. 16. s. 22. "the said Commissioners shall receive and be paid the fee of 20s. each Commissioner for every meeting, and the like sum for every deed of conveyance executed by them, and for the signature of the bankrupt's certificate; and where any commission shall be executed in the country, every Commissioner, being a barrister at law, shall receive a further fee of 20s. for each meeting; and in case the usual place of residence of such Commissioner, being a barrister, is distant seven miles or upwards from the place where such meetings are holden, and he shall travel such distance to any such meeting, he may receive a further sum of 20s. for every such meeting. And every Commissioner, who shall receive from the creditors, or out of the estate of the bankrupt, any further sum than as aforesaid, or who shall eat or drink at the charge of the creditors, or out of the estate of the bankrupt, or order any such expense to be made, shall be disabled for ever from acting in such or any other commission."

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persons, one of whom was the solicitor to the fiat, in exculpation of the Commissioners.

Mr. *J. Russell*, and Mr. *Bethell*, appeared in support of the petition.

Mr. *Swanston*, and Mr. *Girdlestone*, appeared for two of the Commissioners.

Mr. *J. Remilly*, on behalf of the other Commissioner, said, that he had made an affidavit, in which he stated that he submitted his opinion entirely to that of the senior Commissioner at the different meetings, who thought that the Commissioners were legally justified in taking the fees in question. That the fees were given to the deponent by the solicitor's clerk, without making any objection at the time to the payment of them, and that the deponent put them in his pocket, without even counting them, and would have returned them immediately, if the slightest objection had been made to paying them. That the deponent considered that the dividend meeting, the audit meeting, and the private meeting, were three distinct and separate meetings, and that he was entitled to a travelling fee on each of them.

Mr. *Russell* was not called on to reply.

The COURT said, that they had no discretion left them but to issue a renewed fiat, if more than the statutable fees were taken by the Commissioners; in which case the Commissioners would be perpetually disqualified from acting under any future fiat in bankruptcy; and they expressed it as their opinion, that

two travelling fees, for attending two meetings under the same bankruptcy on the same day, were beyond the fees allowed by the statute.

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Upon this intimation, the parties agreed to let the matter stand over for a few days, in the hope of avoiding the necessity of calling for the judgment of the Court.

Ex parte JAMES TUDOR LOMAS.—In the matter of
JAMES TUDOR LOMAS and FREDERICK COOKE.

Westminster,
April 29.

THIS was the petition of one of the bankrupts, praying that the assignees might be ordered to declare a final dividend of the joint estate, and for the costs of the application.

The commission issued on the 5th October 1831, and on the 21st February 1832 a dividend of 10s., and on the 22d March 1833 a further dividend of 4s. 6d. in the pound, had been declared of the joint estate. The debts proved against the joint estate amounted to 855*l.*, and no debt had been proved against the separate estate of *Lomas*; but the assignees had received 22*l.* on account of his separate estate. On the 18th December 1833, the petitioner duly obtained his certificate. The petition then went on to allege, that at the audit meeting held on the 25th March last, it appeared that the assignees had then in their hands a sum of 200*l.* arising from the joint estate, and that the Commissioner appointed a meeting to be held on the 25th April following, for the purpose of declaring a final dividend of the joint estate, but which meeting the

The assignees are accountable for any money they distribute among the creditors without an order of dividend. And although the bankrupt does not obtain his certificate until after such distribution, yet when he does obtain it, he may petition for an order on the assignees to declare a final dividend to the amount of the sum distributed, with a view to claiming his allowance. And the Court will make a proper order, to prevent the bankrupt from being deprived of his allowance to the extent of the sum distributed.

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Lomas.

assignees refused to advertise, alleging that there were no funds in their hands to make a dividend, or to pay the expenses of the meeting; as they had, subsequently to the second dividend, and previously to the bankrupt obtaining his certificate, applied all the monies they received, as well from the joint estate as from the separate estate of the petitioner, in payment of the balances due to the several joint creditors, to make up 20s. in the pound, but not including interest. The petitioner insisted, that these payments, having been made without any authority, and also without any previous audit of the accounts of the assignees, were made in their own wrong, and to the injury not only of the petitioner, but also of those creditors who had not yet proved their debts under the commission; and that he was therefore entitled to have a final dividend declared of his estate, that he might be able to claim his allowance.

Mr. *Ching*, and Mr. *Hetherington*, in support of the petition. The assignees were not justified in distributing the bankrupt's property among his creditors, without a regular order of dividend made by the Commissioners. The 107th section of the 6 Geo. 4. c. 16. requires, that the Commissioners shall appoint a public meeting to make a dividend, of which twenty-one days' notice is to be given in the Gazette, when the Commissioners are to make an order for the dividend in writing under their hands, and to cause one part of such order to be filed amongst the proceedings, and deliver another part thereof to the assignees; which order is to contain an account of the time and place of making such order, of the amount of the debts proved, of the

money remaining in the hands of the assignees to be divided, of how much in the pound is then ordered to be paid to every creditor, and of the money allowed by the Commissioners to be retained by the assignees, with their reasons for allowing the same to be so retained; and that no dividend shall be declared, unless the accounts of the assignees shall have been first audited, according to the directions of the 106th section, and a statement delivered by them, upon oath, of all monies they have received. This provision was intended to give the creditors a salutary check upon the conduct of the assignees. Now, at the audit meeting of the 25th March, the Commissioners found that there was then a balance of more than 200*l.* in their hands; and it is no answer for the assignees to say, we have since distributed the whole of this sum among the creditors, unless such distribution was in obedience to a regular order of dividend signed by the Commissioner. But the assignees have still more wilfully contravened the provisions of the statute; for though the Commissioner appointed a meeting to be held on the 25th April, for the purpose of declaring a final dividend, the assignees refused to advertise or attend such meeting. The assignees are, therefore, clearly liable for the fund they have so illegally paid away.

1834.

Ex parte
LOMAS.

Mr. *Swanston* appeared on behalf of the assignees. The order prayed on this petition cannot be enforced. The order asked for is, that the assignees may be ordered forthwith to hold a meeting, for the purpose of declaring a final dividend of the joint estate; but this is not within the power of the assignees, as there are no funds remaining in their hands to make a dividend.

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LOMAR.**

The bankrupt, also, has no right to complain of what the assignees have done; for if the fund had been distributed under an order of dividend, the bankrupt would not have been entitled to any allowance, as he had not then obtained his certificate (a). [Sir G. Rose. It would be a pretty fraud of the assignees upon the bankrupt, to prevent his claim to his allowance, by distributing all the funds in their hands among his creditors, without waiting for a regular order of dividend of the Commissioner.] The bankrupt cannot be heard against his assignees, except in case of a surplus (b). He has not shown any right to intercept these funds in their way to his creditors; nor can he have any possible claim against the assignees, as they have paid to the creditors all the monies that ever came to their hands. [Erskine, C. J. The question is, were these payments legally made?] [Sir G. Rose. The assignees are not entitled to pay one sixpence to the creditors without an order of dividend.] [Sir J. Cross. Would not your argument lead to this—that when the dividends already paid under a commission with the money in hand, on which a dividend might be declared, were sufficient to entitle the bankrupt to his allowance, the assignees might then make a scramble and pay every farthing away, to deprive the bankrupt of his allowance.] In this case substantial justice has been done. For if in October, when the assignees distributed this fund among the creditors, they had only done so under the authority of a dividend meeting, it is quite clear that the bankrupt would not have been entitled to any allowance, as he had not then obtained his certificate.

(a) 6 Geo. 4. c. 16. s. 128.

(b) *Quere tamen.*

And there is nothing in the 107th section, that would have helped him, so as to prevent all the monies in the hands of the assignees from being distributed among his creditors. [*Erskine*, C. J. Look at the 109th section.] No person can complain of what the assignees have done, who has not been injured by this mere deviation of form; and therefore the bankrupt, who would have received no benefit, if the form had been observed, has no reason to complain of a departure from it in the present instance. If a creditor had been prevented from proving his debt, he might then have had cause for complaint; but as no injury appears to have been occasioned to any of the creditors, no real injustice has been done; for the bankrupt would have been placed precisely in the same situation, as he now is. It is contrary to the practice of the Courts, to listen to complaints of errors of form, where a party had no right to complain when the error was committed, but merely acquires an *ex post facto* right.

ERSKINE, C. J.—When the bankrupt obtained his certificate on the 18th December last, he then acquired a vested right to the allowance provided for him by the statute. On the 25th March preceding, the Commissioner found that a balance of more than 200*l.* was then in the hands of the assignees; and they can only discharge themselves of this sum, by distributing the money under an order of dividend. The assignees have no right whatever to exercise their own discretion in the distribution of the bankrupt's effects; they can only do so, when authorized by the Commissioners. It appears to me therefore, that the bankrupt has, under these circumstances, a right to dispute the conduct of

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Ex parte
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the assignees, with a view to obtaining his allowance ; for, though the Court requires a final dividend to be made before the bankrupt can claim his allowance, yet I think, that the second dividend which was made in this case may be considered as a final one.

Sir J. CROSS.—The first point that was urged in argument on the part of the assignees was, that the Order prayed for on this petition was absurd. If so, the Court has the power to frame a proper Order to meet the circumstances of the case. The second proposition is, that the assignees were empowered to distribute the bankrupt's funds among the creditors, without any order of dividend. I can only say, for my part, that in all my experience in bankruptcy proceedings I never before heard of such a proposition. The third point put was, that the Commissioner was wrong in finding that the sum of 200*l.* was in the hands of the assignees, which they had previously distributed among the creditors. But if the assignees paid this money away without any order of dividend, they paid it in their own wrong, and the Commissioner was quite right, on the audit of their accounts, to find that they were still accountable for money, of which they had not legally discharged themselves. The fourth proposition made was, that the bankrupt is a stranger to this proceeding, and has no interest in the matter, because he had not obtained his certificate before the money was paid away. But, if all the preceding propositions are wrong, the bankrupt has a vital interest in impeaching the conduct of the assignees on this occasion. For what is it they have done? Without obtaining any order of dividend from the Commissioner, they go and

distribute all the bankrupt's effects in their hands, and thus deprive the bankrupt of that allowance which the law has in its wisdom provided for him. I do not impute to the assignees, that it was their intention to commit a fraud upon the bankrupt; but if we were to lend our sanction to such a proceeding as the present, it would lead to the grossest injustice.

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Sir G. ROSE.—The prayer of this petition is quite large enough, to enable us to work out a proper Order to do the bankrupt justice. We find, upon these proceedings, that the Commissioner appointed a meeting to be held for the purpose of declaring a final dividend. The proper Order therefore for the Court to make, under these circumstances, is, that the Commissioner should calculate the bankrupt's allowance on the amount of the sum divided, including the 215*l.*, as if it had been duly applied in the payment of dividends; and that the bankrupt has a claim for any allowance which the Commissioner may find he is entitled to, to the extent of the sum of 215*l.* And I think it is right, that the assignees should pay the costs.

The ORDER made was as follows:—It appearing that a final dividend has taken place, and the assignees admitting that they have applied the balance in their hands, amounting to 215*l.*, in payment to the creditors, and that they have not any further assets,—let the Commissioner ascertain the allowance of the bankrupt, taking into calculation the said sum of 215*l.* so paid as aforesaid, and let the assignees pay such allow-

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ance to the bankrupt, not exceeding the extent of the said sum of 215*l.*, and let the assignees also pay the costs of this application. This Order to be without prejudice to any remedy over which the assignees may have against the creditors.

Westminster,
April 29.

Attendance of
petitioning cre-
ditor dispensed
with, under the
circumstances,
at the opening
of the fiat.

In the matter of POLTON.

MR. ANDERDON moved for an Order to dispense with the attendance of one of the petitioning creditors, on the opening of this fiat, on the ground that the creditor lived in London, and the fiat was to be opened at Bath; the rule being, that when the petitioning creditor resided at a distance of eighty miles from the place where the fiat is intended to be opened, his personal attendance is dispensed with, and he is at liberty in that case to prove his debt by affidavit.

The COURT made the Order accordingly.

Ex parte GEORGE FREDERICK MINTON.—In the
matter of RHODA GREEN.

Westminster,
April 29.

An insolvent
compounds with
her creditors for
13*s.* 6*d.* in the
pound, but pro-
mises to pay one
of her creditors

THIS was the petition of a creditor to prove a debt under the following circumstances:—

It appeared that the bankrupt, who carried on business at Bristol, had in March 1830, previous to the whole of his debt, in order to induce him to sign the composition deed. After paying him in full, she contracts a fresh debt with him, and then becomes bankrupt. *Held*, that the payments made to the creditor above the composition of 13*s.* 6*d.* in the pound were fraudulent and void, and that the creditor could not prove for the amount of his fresh debt contracted with the bankrupt, without first deducting these payments.

her bankruptcy, compounded with her creditors for 13*s.* 6*d.* in the pound; and that the petitioner, whose debt amounted to 269*l.* 15*s.* 9*d.*, received three bills of exchange for 60*l.* 14*s.* 5*d.* as the amount of his composition. On the 31st March the bankrupt paid the petitioner, in addition, the sum of 21*l.* on account of this debt; in October following another sum of 30*l.*; and in August 1831 a further sum of 36*l.* 12*s.* 6*d.* The petitioner stated, that these payments were made to him voluntarily by the bankrupt, without any stipulation on his part, either before or after the execution of the composition deed, and with a view to induce the petitioner to trust the bankrupt again for goods, which she could not get any where else, the goods being a patent article. The petitioner continued to deal with the bankrupt from the time of her failure in March 1830, until the issuing of the fiat against her in November 1832, when she was indebted to the petitioner in 160*l.* for goods sold subsequent to her former failure. On the petitioner applying to prove this debt, the Commissioners only admitted him to prove for 72*l.* 7*s.* 6*d.*, on the ground that the three payments so made to him by the bankrupt, amounting to 87*l.* 12*s.* 6*d.*, ought to be deducted.

The petitioner prayed, that the Commissioner might be ordered to admit the proof for 160*l.*, and for the costs of the application.

In answer to the statements in the petition, the bankrupt swore, that at the time she compounded with her creditors, the petitioner required full payment of his debt, as the only terms upon which he would sign the deed of composition, and threatened to strike a docket against her, unless she consented to do so; that

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after a long discussion she at length promised to pay him the residue of his debt, and that he then signed the agreement for composition.

Mr. *Montagu* appeared in support of the petition; and contended that the assignees had no right to set off the payments that were made in discharge of the old debt, in deduction of the amount due to the petitioner, in respect of the subsequent dealings between him and the bankrupt, the transactions being perfectly separate and distinct.

Mr. *Swanston*, for the assignees. The petitioner had notice given to him by the assignees, previously to any meeting of the Commissioners for the proof of debts, that the assignees intended to dispute his debt; and that it would be necessary for him to attend personally before the Commissioners, if he intended pressing his proof to the full amount claimed by him; but, notwithstanding this notice, the petitioner did not think proper to attend, and merely instructed an agent to tender an affidavit of the debt, but which afforded the Commissioners no satisfactory explanation. The payments made by the bankrupt, beyond the amount of the composition on the old debt, were a fraud upon the other creditors. [*Erskine*, C. J. If the payments were made, in consequence of an agreement with the petitioner previous to the composition deed, then, no doubt, the transaction was fraudulent; but if, as the petitioner has sworn, the payments were made after the deed was executed, and were entirely voluntary on the part of the bankrupt, then, I know of no case that says such payments are fraudulent.] The petitioner states in

his affidavit, that the bankrupt made him the first payment of 21*l.* on the 31st March, and that this was two days after the composition deed was executed; but it is distinctly sworn by the bankrupt and another witness, that though the agreement for the composition might have been entered into at Bristol, before such payment, yet that the deed itself was not executed by the petitioner until some weeks afterwards in London. This has not been denied by the petitioner; so that, according to the undisputed evidence in the case, coupled with the petitioner's own statement, it is clear that the payments were in fraud of the composition deed. In *Jackson v. Lomas* (a),—where an insolvent assigned over his effects for the benefit of his creditors, and in the deed there was a proviso that the shares of those creditors, who did not execute it before a given day, should be paid to the insolvent,—and after that day an agreement was made between the insolvent and a creditor, that the creditors should sign the deed, and that the insolvent would pay him the remainder of his whole debt,—the latter agreement was held to be fraudulent and void. So in *Wells v. Girling* (b),—where A., being in embarrassed circumstances, and indebted to the plaintiff, the plaintiff promised to persuade A.'s creditors to agree to a composition, on condition of A.'s giving the plaintiff a promissory note for the amount of his own debts, signed by A. and another person as surety, which was accordingly given;—and the plaintiff and A. agreed to keep the matter a secret from A.'s creditors,—it was held that the transaction was fraudulent and void, and that the plaintiff could not recover on the note against the defendant. These

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(a) 4 T. R. 166.

(b) 1 Brod. & B. 447.

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authorities plainly show, therefore, that any payments, like those made by the bankrupt in the present case, are void, on the ground of fraud upon the other creditors; and, it may be added also, on the ground of oppression of the debtor. The present is not a case of *pari delicto*, where the guilt is equal in each party; but here it is entirely the guilt of the oppressor.

Mr. *Montagu*, in reply. The question is, is this a mutual debt, or a mutual credit? or could these payments, which were made by the bankrupt to a creditor in satisfaction of a lawful debt, be recoverable back in an action at law? There is no case, which supports such a position. It has been said, that there is a difference between signing the agreement, and executing the deed of composition, but I contend there is no such difference. Taking it for granted, however, that the case set up by the respondents is the correct account of the transaction, then both parties are to blame; and, under these circumstances, it is settled by *Rutter v. Rhodes* (a), and *Bradley v. Gregory* (b), that "*potior est conditio possidentis*." But, in whatever light the transaction may be viewed, it is certainly not a case of set-off.

ERSKINE, C. J.—It is quite clear, that if it had appeared satisfactorily to us on the affidavits, that these had been voluntary payments made by the bankrupt, after the execution of the composition deed, they could not be recovered back by the assignees. But if they were made, as a bribe, to induce the petitioner to execute the deed, or in pursuance of any previous agreement, then the question would arise, whether these

(a) 1 Esp. 236.

(b) 2 Camp. 383.

payments, being fraudulent as against the other creditors, could not be recovered back in an action at law. Now, it appears from the affidavits, that several creditors signed the deed after the petitioner had signed it; so that, if he had previously stipulated for more than the amount of the composition, there can be no question but that it was a fraud upon these creditors, who were deceived by seeing his name previously affixed to the deed. I confess my own opinion is, that, under these circumstances, the petitioner would be liable to refund the payments made to him beyond the amount of the composition; for this would not be a case of *par delictum*, as it would not be the fraud of the debtor (a) in paying the money, but of the creditor in receiving it, and thus extorting more than the other creditors. Then if the bankrupt could have recovered back this money, her assignees could also recover it back, and in that case there would be a clear right of set-off. The whole question depends upon the fact, whether the payments were made in pursuance of a previous agreement; and as there is so much contradiction in the affidavits on this subject, I should wish to look into them, before I deliver my definitive opinion.

Sir J. Cross concurred in the propriety of postponing the final decision of the Court.

Sir G. Rose.—The question is, whether these payments come within the clause in the act of parliament (b) relating to mutual credit. I should have said, that

(a) Would it not, with submission, amount to a *fraudulent preference*; on the part of the debtor?

(b) 6 Geo. 4. c. 16. s. 50.

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where a debtor is prevailed upon to pay one creditor more than the others, as the only condition on which the creditor will consent to sign a composition deed, the debtor could recover it back, as it would be a fraudulent payment, on the principle of public policy, which renders it expedient, not only that one creditor of an insolvent debtor should not be preferred before another, but also that the debtor himself should be protected from oppression. If there had been no release in the composition deed, it might perhaps have aided the case of the petitioner. But, under the present circumstances, I feel bound to say, that this was a payment made by the bankrupt to the petitioner as an inducement to execute the deed, and that it was therefore fraudulent, as against the other creditors, and could not legally be retained.

April 30. . Their Honors this day delivered their judgments as follows: —

ERSKINE, C. J.—The Court are unanimously of opinion, on the authority of the case of *Smith v. Cuff* (a), that this petition must be dismissed, with costs. That case was very similar to the present, and it was there also contended in argument by the counsel, that the parties were *in pari delicto*. But Lord *Ellenborough*, in his judgment, says, “this is not a case of *par delictum*; it is oppression on one side, and submission on the other; it never can be predicated as *par delictum*, where one holds the rod, and the other bows to it. There was an inequality of situation between these parties; one was creditor, the other debtor, who was

(a) 6 M. & S. 160.

driven to comply with the terms which the former chose to enforce. And is there any case, where, money having been obtained extorsively, and by oppression, and in fraud of the party's own act, as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided that an action lies." This, then, being the law on the subject, the case resolves itself entirely into a question of fact, namely, whether there was any previous agreement that *Minton*, the petitioner, should receive more than the other creditors of the bankrupt. After carefully looking through the affidavits, I am satisfied that there must have been some previous arrangement of this kind; for it appears, that some of the creditors held out, and did not sign the deed until after it was signed by *Minton*. And, indeed, the probability of the case is strongly against the account given by *Minton* of the transaction; for it is not very likely that a woman, having just been freed from her difficulties, would make these payments to him as a voluntary gratuity. If this money, therefore, was paid by Mrs. *Green*, in compliance with a previous demand of *Minton*, and under a well-grounded apprehension on her part, that *Minton* would not execute the deed unless these payments were made to him, in addition to the composition of 13s. 6d. in the pound, I am of opinion, that Mrs. *Green* could have recovered them back, or set them off, in an action at law; and that being so, the same right will of course devolve upon her assignees. The Commissioners were, therefore, as it appears to me, quite correct in the view they have taken of the question.

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Sir J. Cross.—There can be no doubt as to the law in this case; I was only anxious to look through the affidavits, to satisfy myself about the facts. Now, Mrs. *Green* positively swears in her affidavit, that *Minton* told her he would never enter into the arrangement then pending between her and her creditors, unless she would give him security for the whole of his debt,—that the discussion on the subject lasted two hours,—that Mr. *Fry*, a friend of her's then present, but who is since dead, expostulated with *Minton* to no purpose,—that she at last reluctantly consented to comply with the demand,—and that *Minton* said, the other creditors need know nothing of this private arrangement. Then, what does the solicitor say, who prepared the composition deed? He swears, that it was not prepared until the 22d April, and was afterwards sent up to London for the signature of *Minton*, and the other creditors who resided there. I am clearly of opinion, that the whole transaction was a fraud against the other creditors, and that the amount of the payments made to *Minton*, beyond the amount of the composition, ought to be deducted from his subsequent debt.

Sir G. Ross concurred.

The petition was therefore dismissed, with costs.

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Ex parte JOSEPH JONES.—In the matter of
CLARKSON LAMPLOUGH.

Westminster,
April 30.

THIS was the petition of a trustee under a trust deed executed by the bankrupt, praying that the fiat might be annulled at the costs of the petitioning creditors. The following were the facts, as stated in the petition.

On the 7th August 1833, the bankrupt assigned by deed the whole of his effects to the petitioner, upon the usual trusts for payment of his debts; but the monies received under it were not sufficient to pay the creditors in full. In October 1833, *Harding & Co.* applied to become parties to this deed of assignment, claiming to be creditors of the bankrupt for 367*l.* 6*s.* 4*d.*; part of this sum, namely, 257*l.* 1*s.* being for principal and interest due to them from the bankrupt on a joint and several warrant of attorney entered into by the bankrupt with his father, *Thomas Lamplough*,—and the remainder, namely, 107*l.* 8*s.* 5*d.* being for principal and interest due on a joint promissory note of the bankrupt and one *Henry Ward*. The warrant of attorney was entered into by the bankrupt as surety for his father, for the payment of 250*l.* and interest by instalments, the first instalment to become payable on the 9th January 1834; but the bankrupt himself never received any consideration for joining in it; and the petitioner, considering that there having been then no default in the payment of the money secured by the warrant of attorney, according to the terms of the defeazance, refused to permit *Harding & Co.* to sign the deed, in respect of the debt they claimed to be due upon it. With respect to the promissory note, the petitioner

A tender made to the petitioning creditor of the payment of his debt, after a docket had been already struck against the bankrupt, although before the fiat was actually issued, is not sufficient to defeat the fiat.

Any party, who can show that he sustains a grievance from a fiat, may petition to supersede it, notwithstanding he claims adversely to it. A trustee, therefore, under a trust deed, which the fiat would overreach, may petition for this purpose.

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stated that *Henry Ward*, the other joint maker of it, who was a surety with the bankrupt, in December 1833 repeatedly offered to pay the amount of it to *Harding & Co.*, and on the 23d December made a formal tender of the money to *John Harding*, who refused to accept it. Previous to the tender, *Henry Ward* had consented to become a party to the trust deed, and was still ready to execute it. On the same day on which the tender was made, namely, the 23d December, a fiat was issued against the bankrupt by *Harding & Co.*, under which *Harding* was chosen sole assignee. The petitioner stated, that he and his partner were creditors of the bankrupt to the amount of 145*l.*, and that there was no debt owing from the bankrupt to *Harding & Co.*, except those claimed by them on the joint warrant of attorney and the joint promissory note.

In answer to the statements in the petition, *Harding* swore that on the 18th December he made an affidavit of debt, and executed the usual bopd, for the purpose of striking a docket against the bankrupt,—that these were sent up to London from Bridlington in Yorkshire for that purpose,—that on the 21st December the docket was struck,—and that on the 23d December the fiat was accordingly issued; and that a person applied to the deponent in the evening of the 21st December, relative to a tender on behalf of *Ward* of the money due on the note, but that no actual tender was made until the evening of the 23d December;—and that the reason why the fiat was issued, was, because the petitioner refused to let *Harding & Co.* come in under the assignment.

Mr. *Bethell*, and Mr. *Arnold*, on behalf of the as-

signee, took a preliminary objection to the petition, namely, that the petitioner, having possessed himself of all the property of the bankrupt under the trust deed, was not a creditor claiming under the fiat; that the object of the petition was to defeat the fiat, because it would overreach the deed; and that the petitioner had no *locus standi in curiâ*, claiming nothing under the fiat.

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ERSKINE, C. J.—It struck me, at first, that there was something in this objection; but my colleagues thought differently, and on consideration, I am inclined to agree with them in opinion. When any party can show that he will suffer a grievance in consequence of the fiat, he may petition to supersede it. It has been determined, even in the case of a witness who was summoned to attend before the Commissioners, that he might petition to supersede it.

Sir G. ROSE.—It is not because a party claims adversely to the fiat, that he may not petition to supersede it. A judgment creditor may petition for this purpose: and even a bare trustee under a deed, who is not a creditor, may apply for a supersedeas, on the ground that the fiat will prevent the execution of his trust, and is therefore so far injurious to him. Here, the trustee will suffer a material grievance from the fiat; because, if the fiat is proceeded with, the trust deed will then become inoperative, and in that case the trustee will be personally liable for all charges relating to it. The petitioner, however, must enter into an undertaking to bring the property into Court, and to abide by the judgment of the Court, if it should

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appear to be against him, as well as not to bring any action at law.

Mr. *Swanston*, and Mr. *Ching*, in support of the petition. There is no objection to such an undertaking. The question is, whether a creditor can issue a fiat after a tender of his debt. Now the facts are here, that a tender of the money due on the note was made to the petitioning creditor before the fiat issued. It appears, that an agent on the part of Mr. *Ward*, who was the joint maker of the note with the bankrupt, applied to Mr. *Harding*, in the evening of the 21st December, to tender him 105*l.* for the balance of principal and interest due on the note,—and that *Harding* refused to take the money then, as it was after the usual hours of business. The tender, however, was repeated on Monday the 23d December. If we can show, therefore, an application to make a tender on the 21st December, and a refusal then to accept it, and afterwards an actual tender on the 23d, the tender will relate back to the first application to make it, and which was only then prevented by the act of the creditor himself. [*Erskine C. J.* The question is, whether a legal tender was made on the Saturday, *before* the docket was struck; for if the docket was previously struck, it becomes immaterial whether the tender was made on the Saturday, or the Monday.] There was but one debt due to *Harding & Co.* from *Ward* and *Lamplough* jointly, and if we show a tender by one of the joint debtors before the fiat was issued, it is an answer to the fiat; for it would be most unjust, that a creditor should be permitted to issue a fiat, when he might, if he chose, have previously received his debt. Now,

was what passed on the Saturday equivalent to a tender, or not? The Court is not to determine what would be a sufficient tender to bar an action at law for a debt, but whether it would be equitable in this case, that a creditor should make a man a bankrupt, who was ready and willing to pay him his debt. It cannot be said, that a trader intends to defraud or delay his creditor, when he offers to pay the creditor what he owes him. The nonpayment of the debt in this case does not arise from the delay or fraud of the debtor, but from the wilful refusal of the creditor to receive his debt. And it makes no difference in this respect, whether the tender was made before the striking of the docket, or the issuing of the fiat. [Sir J. Cross. Is there any case reported, where the tender has been made between the docket and the issuing of the fiat?] [Sir G. Rose. It has been decided, that even the payment of a bill of exchange by one of the parties liable on it, will not defeat a commission issued against another party to the bill, where the payment was made after the docket was struck.] The refusal to accept the tender, in this case, was uninfluenced by the striking of the docket, which the creditor could not then know; the only reason assigned for the refusal was, that it was after the usual hours of business.

Mr. *Bethell*, and Mr. *Arnold*, for the assignees, were stopped by the Court.

ERSKINE, C. J.—The question in this case is purely one of law. It is not pretended, that the fiat has been sued out against this party, contrary to the policy of the bankrupt laws; but that there was no valid existing

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petitioning creditor's debt at the time it was issued, because there had been a previous tender of it to the petitioning creditor. Now, even supposing there had been a good tender on the Saturday before the fiat issued,—still, that would not have extinguished the debt, but have merely operated as a bar to an action; and if there be a subsequent demand and refusal to pay the debt, an action will still lie, notwithstanding a previous tender. Besides, the tender here was in the name of *Ward*; so that it could not have been pleaded as a bar to an action against the bankrupt. But the facts of the case do not amount to any tender made to *Harding* before the striking of the docket, independently of the question, whether a tender to *Harding* in the name of *Ward*, would be a good tender of the debt due from *Lamplough* to *Harding*.

Sir J. Cross.—The petitioner requires this fiat to be superseded, because, he says, there is no good petitioning creditor's debt. It might indeed have been a question of some nicety, if the money had actually been accepted by *Harding* from the surety of the note, when the tender is alleged to have been made. But it appears, that he refused to accept the payment of the note; and the question is, whether he was not justified in such refusal. It should be recollected, that *Harding* had already made affidavit of his debt, and sent instructions to London for the purpose of striking a docket, before even any application on the subject of a tender is alleged to have been made; and it does not appear to me to be so very unequitable, as it has been contended, that after this *Harding* should refuse to accept the money. A tender made after action brought

has no legal operation whatever (a). And so in this case, I think, unless the petitioner could have shown that the tender was made before the docket was struck, it would be of no avail to defeat the fiat. That not being done, there appears to be no ground for this petition.

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Sir G. ROSE.—This is entirely a struggle between two sets of assignees; and the question is, which is here to have the preference, an assignment of the property under the trust deed, or the assignment under the bankruptcy by operation of law? Now, instead of a tender, if the surety had even *paid* the debt in this case, it would not have defeated the fiat, if a docket had been previously struck. In *Ex parte Douthat* (b), where the drawer of a bill of exchange had committed an act of bankruptcy before the bill was due or had been presented for payment, it was held, that the bill was a good petitioning creditor's debt; although it appeared, that subsequently to the commission the bill had been duly presented and paid by the acceptors. If the tender, in the present case, had been made before the docket was actually struck, I should have been disposed to think then, that a fiat issued afterwards would not have been valid; as the tender would have been an answer to an action at law. But it is unnecessary to consider that question, as it does not arise from the facts of this case.

The Order made was, that the fiat issued was good and valid; that it should be referred to

(a) See *Briggs v. Calverley*, 8 T. R. 629. (b) 4 Barn. & Ald. 67.

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the Registrar, by the consent of the petitioner, to take an account of the property which the petitioner took possession of under the trust deed, making all just allowances; that the costs of the assignees of this petition should come out of the estate, reserving the question out of what fund all costs should be eventually paid; that the assignees should be restrained from bringing an action at law against the petitioner; and that all further directions should be reserved.

Ex parte SIGISMUND RUCKER, and SIGISMUND RUCKER the younger.—In the matter of DANIEL HENRY RUCKER, JOHN ANTHONY RUCKER, and HENRY JOHN RUCKER.

Westminster,
May 24 & 29.

By the laws of Antigua, slaves were declared to be inheritance, and affixed to the freehold; and by 59 Geo. 3. c. 120. s. 9., no deed or instrument conveying any interest in slaves was valid, unless the registered names and descriptions of the slaves were set forth in the instrument, or in some schedule thereof.

The bankrupts deposited with R. & Co., as security for a loan of money, a deed of conveyance to the bankrupts of a plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit. *Held*, 1st, that this was nevertheless a good equitable mortgage of the slaves mentioned in the deed. 2dly, That the slaves, being real property in the Island of Antigua, could not be considered as within the order and disposition of the bankrupts at the time of their bankruptcy.

THIS was the petition of equitable mortgagees for the sale of a certain plantation, and slaves, in the Island of Antigua, under the following circumstances.

The bankrupts, for many years prior to November 1831, carried on business in co-partnership, as West India merchants and wool merchants, under the firm of *D. H. and J. A. Rucker & Co.*, and were entitled in fee simple to a plantation in the Island of Antigua, called Yeamans, together with the slaves thereon.

On the 5th August 1831, the petitioners lent to the bankrupts the sum of 1000*l.*, and at the same time accepted for their accommodation, without receiving

any consideration for the same, three several bills of exchange for the sums of 1000*l.*, 1000*l.*, and 2000*l.* respectively, drawn by the bankrupts upon the petitioners, and payable to the order of the drawers one month after date. In consideration of this advance, *Henry John Rucker*, on behalf of himself and his co-partners, on the 5th August 1831 signed in the name of the partnership, and delivered to the petitioners, a written memorandum or agreement, which contained, among other things, as follows:

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“ Messrs. *Sigismund Rucker and Son*,

Dear Sirs,

5th August 1831.

In consideration of your having accepted our three several drafts upon you for 1000*l.*, 1000*l.*, and 2000*l.*, dated this day, at one month, to our own order, due 5 & 8 September, and at the same time of your having lent us in cash the sum of 1000*l.*, making together the sum of 5000*l.*: we hereby deposit and pledge with you the conveyance to us, for a valuable consideration, of the plantation called Yeamans, in the Island of Antigua, together with the slaves thereon and premises, executed by *Charles Robertson* and *Eliza* his wife on the 10th July 1827, and recorded on the same day; it being understood, that the acceptances before described have been granted at our request, and for our accommodation; and we promise, that previous to their becoming due, we will place the money in your hands to meet the same, together with the sum of 1000*l.*, being the return of the cash received from you this day over and above the said three acceptances.”

This memorandum was duly registered in the Island

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of Antigua on the 18th June 1832; and at the time of signing the agreement, *D. H. and J. A. Rucker & Co.* deposited in the hands of the petitioners the deed therein mentioned, which was a conveyance to the bankrupts, their heirs and assigns, of the plantation estate called Yeamans, “and all negroes and other slaves, and all horses, mules, and other cattle, particularly mentioned and described in a certain schedule annexed to the said deed, and the offspring, issue, and increase of the said slaves and stock.”—“To hold so much, and such part of the said plantation, slaves, tenements, and hereditaments, as were freehold, unto and to the use of the bankrupts, their heirs and assigns for ever, as tenants in common; and to hold such part of the said premises as were personal estate, or of the nature of a chattel interest, unto the said bankrupts, their heirs, executors, administrators and assigns respectively, absolutely for their own use and benefit.”

The commission issued against the bankrupts on the 17th November 1831, when there was due from them to the petitioners 1529*l.* 0*s.* 9*d.*

All consignments of the produce of the plantation comprised in the equitable mortgage, which arose since the bankruptcy, were made to the assignees, and the proceeds thereof received by them, without any part going in reduction of the sum of 1529*l.* 0*s.* 9*d.* so due from the bankrupt to the petitioners. A considerable quantity of the produce consigned was still in the hands of the assignees, and further consignments were expected. The proceeds of the sale of the plantation, slaves, and other premises comprised in the security, the petitioners stated, would not, in all probability, be

sufficient to satisfy what was due to them for principal and interest.

The petition prayed, therefore, for the usual order in cases of equitable mortgage.

Mr. *J. Russell* appeared in support of the petition.

Mr. *G. Richards*, for the respondents, (the assignees,) objected that the memorandum of agreement; under which the petitioners claimed, was void under the provisions of the 59 *Geo. 3. c. 120. s. 9.*, which declares, that no deed or instrument executed for the conveyance of slaves shall be valid, unless the registered names and descriptions of such slaves are set forth in the instrument, or in some schedule thereof; and in this case the slaves were not named or described either in the memorandum of deposit, or in any schedule thereof(*a*). He

(*a*) The words of the section are, " That from and after the said first day of January 1820, no deed or instrument made or executed within the united kingdom, whereby any slave or slaves in any of the said colonies shall be intended to be mortgaged, sold, charged, or in any manner transferred or conveyed, or any estate or interest therein created or raised, shall be good or valid in law to pass or convey, charge, or affect, any such slave or slaves, unless the registered name and description, or names and descriptions, of such slave or slaves shall be duly set forth in such deed or instrument, or in some schedule thereupon indorsed or thereto annexed, according to the then latest registration or corrected registration of such slave or slaves, in the said office of the registrar of slaves : Provided always, that no deed or instrument shall be avoided or impeached, by reason of a clerical error in setting forth the names and descriptions of any slave or slaves therein, or in any schedule thereto contained, nor shall the same be avoided or impeached by reason of any disagreement between the names and descriptions, and the entries thereof in the book of registry or duplicate registry, which shall have arisen from any error or default of the registrar, his assistants or clerks, in extracting and certifying the said names and descriptions, without the fraudulent contrivance or wilful default of the parties to such deed or instrument : Provided also, that nothing herein contained shall extend to or be construed

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also contended, that the slaves, cattle, and other apparatus on the plantation, were personal estate, and were in the order and disposition of the bankrupts at the time of their bankruptcy, and that the bankrupts' assignees were now therefore lawfully in possession of them.

Mr. *Russell*. Whatever may be the law in the other West India islands, slaves, according to the laws of Antigua, are there considered as affixed to the land, and therefore as being of themselves real property. By the laws of that island, a wife has long been held to be entitled to a right of dower in the slaves belonging to an estate, *Meynell v. Moore* (a). For by an act of assembly there, made the 21st July 1692, it is enacted, "That all negro and other slaves, after the date of that act, should be inheritance, and affixed to the freehold, and the widow capable of being endowed thereof; provided always, that any *executor* or *administrator* might inventory the said negroes, but not take them into his custody; to the intent that if there should not be sufficient goods and chattels to pay the deceased's debts, then the said negroes were liable to be

to hinder or prevent the transfer or assignment of any security, mortgage, or charge of or upon slaves granted, made, or executed antecedently to the passing of this act, nor to avoid any deed or instrument whereby such security, mortgage, or charge shall be hereafter transferred, nor to avoid, hinder, or impeach any will, codicil, or other testamentary paper, or any probate or letters of administration, or any bill of sale, assignment, conveyance, or instrument made by or under the authority of any commission of bankrupt, or any public officer appointed to assign or convey any insolvent's estate and effects, or by or under the authority of any court of justice, or any officer thereof, or in the execution of any legal process, by reason that the registered names and descriptions of any slaves are not set forth in such deed, will, codicil, testamentary paper, probate, letters of administration, bill of sale, assignment, conveyance, or instrument.

(a) 4 Bro. P. C. 103, Toml. edit.

taken for the payment of such debts, *and be chattels for that purpose, and not otherwise*" (a).

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As to the other objection, viz. the want of registration, that is easily disposed of. The claim of the petitioners, as equitable mortgagees, is not founded solely on the memorandum accompanying the deposit of the deeds; for this has merely the effect of entitling them to costs, and is by no means necessary to give validity to the equitable mortgage, which is created simply by the deposit of the title-deeds. It was never the intention of the legislature, from the wording of the 59 Geo. 3., to shut out equitable mortgages entirely. The words are, that no deeds "*shall be valid in law,*" unless &c. Nothing is said of equity, and nothing in the act can be extended to equitable mortgages. This is plain, from the decisions which have taken place as to the effect of the English Registration Act, 7 Ann. c. 20. In *Sumpter v. Cooper* (b), a debtor had deposited the title-deeds of houses with his creditor, as a security, and afterwards executed an assignment of his interest in them to the same party. The deed creating this assignment was never registered, pursuant to the 7 Ann. c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for a moiety of the rents of the houses which he had received from the time when the bankrupt had assigned to him the property, contending, that as the unregistered deed of assignment was void, as against the registered assignment in bankruptcy, so also the right as equitable mortgagee was no less invalid. But it was held, that the rents

(a) See *Meynell v. Moore*, *supra*, 110. (b) 2 Barn. & Adol. 223.

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which the defendant had received, as equitable mortgagee, could not be taken out of his hands; thereby establishing that the equitable mortgage was perfectly valid. [Sir G. Rose. I think the question, as to the defective registration, is already settled,—first, by the case of *Jones v. Gibbons* (a), and afterwards by the case of *Ex parte Coles, re Rucker* (b), which was determined by this Court, and arose out of this very bankruptcy.] Whatever might be the effect of the objection as to non-registration in the mouth of a purchaser, yet the assignees cannot stand in a more favourable position than the bankrupt himself, who would not be listened to for a moment on an objection of this nature. There is also another difficulty opposed to the claim of the assignees, namely, that this property, being situate abroad, does not in any way pass to the assignees.

Mr. G. Richards. As to the last proposition, it is clear that it cannot be maintained, for both decision and statute are against it. The 6 Geo. 4. c. 16. s. 64. provides, that the Commissioners are to convey (c) the real estate of the bankrupt to the assignees, whether situate “in England, Scotland, or Ireland, or in any of the dominions, plantations, or colonies belonging to his Majesty,” except copyhold, &c. And the case of *Sill v. Worswick* (d), is to the same effect. With respect to the objection for want of registration,—it is to be observed, that the case of *Jones v. Gibbons* (e), which has been alluded to by Sir G. Rose, occurred long before

(a) 9 Ves. 407.

(b) 1 Dea. & Ch. 100.

(c) No conveyance is now necessary; the property vesting in the assignees by their appointment. See 1 & 2 Will. 4. c. 56. s. 26.

(d) 1 H. Black. 665.

(e) *Suprà*.

the 59 *Geo. 3. c. 120.*; it is of little authority, therefore, on the present occasion. That case was decided, also, with reference to the General Registry Acts as to land, and has no application to the Slave Registry Act;—the first were made for the protection of purchasers, while the sole object of the latter is the protection of the slaves. This is plainly shown from the title and preamble of the act, as well as from the wording of the 8th and 9th sections (*a*); the provisions of which were intended to prevent the illicit traffic in slaves, and the consequent increase of slavery. The act is similar in its purpose to that of the Ship Registry Act (*b*), and must receive, like that statute, the strictest construction (*c*). The case of *Jones v. Gibbons* would, in all

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(*a*) The 8th section of the act declares, “ that from and after the first day of January 1820, it shall not be lawful for any of his majesty’s subjects in the united kingdom to purchase, or to lend or advance any money, goods, or effects, upon the security of any slave or slaves in any of his majesty’s colonies or foreign possessions, unless such slave or slaves shall appear by the return received therein, to have been first duly registered in the said office of the Registrar of Colonial Slaves; and that every sale, mortgage, and conveyance, or assurance of, and every charge or other security upon, any slave or slaves, not so appearing to be registered, which at any time or times after the said 1st January 1820, shall be made or executed within the united kingdom, to, or in trust for any of his majesty’s subjects, shall be absolutely null and void, in respect of any such unregistered slave or slaves; and that for this purpose no slave or slaves shall be deemed and taken to be duly registered, unless it shall appear that a return of such slave or slaves, duly made by the owner or owners, or other persons in his or their behalf, in the manner and form required by law in the colony in which such slave or slaves may reside, or a copy or abstract of such return, which shall have been received in the office of the said Registrar from the colony in which such slave or slaves shall reside, within the four years next preceding the date of such sale, mortgage, conveyance, or assurance, charge, or security as aforesaid.”—For section 9, see *ante*, p. 707, note (*a*).

(*b*) 3 & 4 *Will. 4. c. 55.*

(*c*) An agreement between *A. B.* and *C.*, that they shall purchase a ship to be registered in the names of *A.* and *B.* only, is against public policy,

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probability, have been decided differently, if it had occurred since the passing of the Slave Registry Acts. It is true that in the deed, under which the bankrupt held this property, the names of the slaves are duly entered, and that that deed is properly registered. But these requisites are wanting in the instrument under which the petitioners now claim, viz. the agreement accompanying the deposit of the title-deeds. And although this is only an equitable mortgage, yet the provision of the 9th section of the 59 Geo. 3. c. 120. that no deed shall be valid whereby any slaves "shall be intended to be mortgaged," clearly refers to equitable mortgages, as well as to legal mortgages. The mere deposit of title-deeds is, in this instance, not sufficient for the title of the petitioners; for, according to the true construction of the 8th and 9th sections of the statute, no title can be acquired, unless the names and descriptions of the slaves are set forth in the instrument, by which they may be in any manner transferred. It is not enough, that their names and descriptions are contained in the title-deed; for a considerable period of time has elapsed since that was executed, and *non constat* but that the slaves now sought to be transferred may be quite a different and fresh set. It is quite clear, that this is a species of property which can only be transferred by writing, and not by mere delivery. If there be no written document, therefore, nothing can be conveyed; and if there be a written document, the statute

and an account of such transaction was refused to C.; *Battersby v. Smyth*, 3 Madd. 110; as the registered owners are deemed the true and only owners, *Ex parte Machell*, 2 Ves. & B. 216; S. C. 1 Rose, 447. See also *Thompson & Leake*, 1 Madd. 39; *Ex parte Houghton and Gribble*, 17 Ves. 251; S. C. 1 Rose, 177; and other cases collected, 2 Chit. Eq. Ind. tit. "Ship Registry."

then declares the transaction to be void, unless certain forms are observed. Those forms are in this case altogether omitted, and consequently the transaction, as far as regards the slaves, has no operation either at law or equity. If this were not so, the intent of the act would be defeated. The object of it was, to prevent fresh slaves from being brought into the market; and the means which the legislature took to effect this object were, to provide that the names of all existing slaves should be registered in the island to which they belonged, and that upon any sale or transfer of them, the deed of conveyance was to contain the names of such slaves as were intended to pass. The proper observance of these provisions would effectually check the increase of slavery. But if the present mode of transfer is allowed to stand good, every facility is afforded to obstruct the intention of the legislature, by the secret introduction of fresh victims of slavery into the market.

If the Court, however, should think differently upon this point, still it is submitted, that these slaves were in the order and disposition of the bankrupts at the time of their bankruptcy, and therefore passed to their assignees. It has been contended, that they are not within the rule of order and disposition, because by the laws of *Antigua* they are real, and not personal, property. But although, by the laws of that island, they may for some purposes be considered to be real estate, yet they cannot be considered such for all intents and purposes; for they cannot have such an indivisible connection with the land, as it would be necessary they should have, in order to maintain this proposition. [Sir J. Cross. It is by no means unusual,

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in the West India Islands, for a slave owner to be without one acre of land belonging to him. He jobs, or lets out, his gang to other persons, just as any chattel is let out in this country. Such slaves; therefore, can hardly be said to be real chattels.] By the act of assembly, also, before alluded to, slaves are expressly declared to be liable to the payment of debts, although it says they shall belong to the heir. Suppose any personal injury be done to a slave by a third person, would any one contend that the form of action would be trespass *quare clausum fregit*, as for an injury done to real property?

Mr. *Russell* was not called on to reply.

ERSKINE, C. J.—The grounds of opposition to the prayer of this petition are twofold. 1st. It is contended that, as to the slaves, no mortgage, either equitable or legal, was properly effected under the 59 *Geo. 3. c. 120*; and, 2dly, it is urged, that if an equitable mortgage were really effected, the slaves in question did not pass, inasmuch as they were but personal chattels, and therefore in the order and disposition of the bankrupts at the time of their bankruptcy.

The first question depends solely upon the construction of the 9th section of the statute already referred to. It is beyond a doubt that, by the deposit of title-deeds, an equitable mortgage may be effected of land, and indeed of every other kind of property, unless the doctrine of reputed ownership and order and disposition intervenes to prevent the interest of the mortgagee. But the assignees in this case mainly rely on the objection, that as the statute requires that the names of all the slaves intended to pass by any mort-

gage or transfer shall be inserted and scheduled in the instrument of conveyance, and as the names of these slaves were not scheduled in the memorandum of deposit given by the bankrupts to the petitioners, no mortgage, either legal or equitable, could be effected *as to the slaves*. If we look at the eighth section of the statute alone, it is clear, that there is nothing there to prevent a mortgage by the mere deposit of title deeds; for that section only provides that the deed shall be void unless registered, and there is no pretence that the present transaction was not duly registered. But the 9th section provides, "that no deed shall be valid, unless the registered names of the slaves be duly set out in such deed or instrument." Now, if the petitioner rested his claim solely on the memorandum of deposit, as the instrument of mortgage, it might be a very good argument to say, that that instrument was void, for want of its containing the requisite schedule of the names and descriptions of the slaves. But the petitioners need not rely at all on the memorandum, as the foundation of their title; for that rests entirely on the deposit of the deeds, and the memorandum only affects their right to costs. The question then is, whether the 9th section prevents the petitioners, being now out of possession of this property, from obtaining priority over the assignees, who have the possession. My present impression is, that that section does not interfere with an equitable mortgage, by deposit of a deed which does contain the names and descriptions of the slaves; because, as the mortgagor thereby virtually undertakes to execute a legal mortgage of the property mentioned in the deed, the equitable mortgagee is therefore entitled to have a mortgage executed to him in due form.

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with the names and descriptions of the slaves properly inserted in it, as in the deed deposited. But as it is a question of considerable importance, it would be well to re-consider it before I deliver my final opinion; and it may also be very properly open to an inquiry, as to whether the law of *Antigua* holds slaves to be real, or personal, chattels. For, if the transaction between these parties amounts to a good equitable mortgage of the subject in dispute, the question then arises, whether the slaves are to be considered as goods and chattels in the order and disposition of the bankrupts; for there is no doubt, that they continued in their possession at the time of their bankruptcy. By the local act of *Antigua*, slaves are declared to be affixed to the freehold; but a suggestion has been thrown out, that there may be slaves in gross, which cannot be affixed to any freehold, as the owner of them may possibly have no freehold property to affix them to; and that they must consequently be considered to be purely chattels. If they be chattels, however, they may be chattels real, as passing to the heir, and being liable to dower; and they would not then be necessarily within the order and disposition clause of the Bankrupt Act. Before this point is decided, I think it is necessary to ascertain the precise quality of the slaves in question. By the statute of 59 Geo. 3. c. 120., it would seem that slaves have been looked upon as real estate; for it alludes to conveyances and mortgages of them, which clearly implies that they are of the nature of chattels real. As to this, however, it is better that there should be some inquiry.

Sir J. Cross.—As the assignees are at present in possession, it falls on the petitioners to show a good

title to eject them. Upon the general question I decline giving any opinion, till I have had time to look into the statute; as it is certainly a very great commercial question, whether slaves be real or personal property.

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Sir G. ROSE.—The present question has never previously been brought before this Court; for the former case of *Ex parte Coles* (a) involved merely a question as between the purchaser and the bankrupt and his assignees, and related only to the 8th section of the 59 Geo. 3. c. 120. It has been long well known by Chancery lawyers, that slaves have never been considered as goods and chattels, nor as assets, except for the payment of debts. They have been always regarded, as far as I can remember, as real estate. But it is not necessary, for the present purpose, to ascribe to them the entire character of realty; for so long as they are held to be mere chattels, requiring a conveyance by modes which are only requisite to convey real property, *that* is sufficient to take them out of the doctrine of order and disposition. Now I find that slaves are, both by practice, and by act of parliament, the proper subjects of conveyance and mortgage; there is therefore, in my opinion, an end of the point of order and disposition.

The only doubt then is, if the security in question can be made available as against the assignees, or how far their rights will operate to control the contract made between the petitioners and the bankrupts. Two clauses of the 59 Geo. 3. c. 120. have been referred to, on this branch of the question. The first is the 8th section, which provides that no property shall pass in a slave unless duly registered; in other words, he is manu-

(a) 1 Dec. & Ch. 100.

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mitted, unless the forms of the statute are complied with. But this provision is intended merely for the protection of the slave, and does not affect the contract between the parties, or the property of the petitioners in the slaves, if such property exists at all. The ninth section then provides certain forms on the transfer of slaves, and declares that they shall not pass, unless those forms are complied with. Now, the memorandum of deposit in this case is duly registered under the provisions of the eighth section, and therefore a property exists in the slaves somewhere; and the question is, whether there is any thing in the ninth section of the act to prevent it from passing to the petitioners, or whether the property is in any way affected by the bankruptcy? If the property be not in the petitioners, where is it, let me ask? It cannot be in the bankrupts, because by contract they have placed it out of them. It cannot be in the assignees, because their conscience is bound by the contract of the bankrupts, rendering them liable, when called on, to execute a proper legal mortgage of the property in question.

The analogy attempted to be established between the present case, and those decided under the ship registry acts, does not exist. A ship, before the passing of those acts, being no more than a personal chattel, could only pass by delivery and possession; and in order to remedy the inconvenience to commerce, which ensued from this clog on such valuable property, the statute declared that the property should pass, like real estate, by deed, provided certain forms were complied with. But unless those forms were observed, ships remained, as before, mere personal chattels, subject to all the incidents of personalty, and liable to the claims

of assignees, if in the reputed ownership of the bankrupt mortgagor or vendor. But it is otherwise where the subject of the contract is real estate, as these slaves appear to be; for no real property of any kind falls within the provision (a) of the statute relating to reputed ownership. If, then, we find that the contract between the parties is applicable only to real property, and there is no law, like the Ship Registry Act, declaring that the transfer shall be invalid both in law and in equity (b), unless such and such forms are observed, we, sitting as a Court of Equity, are bound to give effect to the *bonâ fide* contract between the parties, and declare, that according to the memorandum, and the deed by which it was accompanied, the slaves in question passed to the petitioners; for the moment the deed was deposited, containing the requisite schedule of the names and descriptions of the slaves, the bankrupts did that which is considered in equity as a promise to execute a legal deed of mortgage. This in no respect breaks in upon the policy of the act of the 59 Geo. 3., in which there is nothing to prohibit equitable mortgages; and as the deed deposited with the petitioners contains a proper schedule of the names and descriptions of the slaves, none of the mischiefs provided against by the act can by any possibility be occasioned by this transaction. I therefore do not hesitate now to declare my opinion, that the property in the slaves duly passed to the petitioners, as equitable mortgagees.

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The COURT, however, deferred pronouncing final judgment, and said, that an inquiry might be expe-

(a) 6 Geo. 4. c. 16. s. 72.

(b) 3 & 4 Will. 4. c. 55.

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dient as to the question, whether slaves were real property or not, according to the laws and customs of Antigua.

May 29.

The Judges, this day, delivered their opinions as follows:

ERSKINE, C. J.—Upon the former occasion, when this case was discussed before us, no precise evidence was offered of the law of Antigua, as to the nature of the property in slaves, which, before we could take legal cognizance of, we ought to have been furnished with, as we can take no notice of foreign or local laws, unless they are regularly proved before us. But without going into that point, I think we are in possession of sufficient materials to enable us to dispose of the present question. The 59 *Geo. 3. c. 120.* was referred to in the argument, for the purpose of showing that slaves are considered to be real estate. The 8th and 9th sections of that act, in pointing out the mode of conveyance and transfer of them, would certainly lead to a strong inference that they are to be so considered; but then it must not be overlooked, that there are other words in the statute which would lead to a contrary conclusion, namely, that for certain purposes they are to be taken as goods and chattels. This statute, therefore, is not sufficiently explicit to conclude the point, when, for aught we know, the local law of the island might declare slaves to be personal property. But, if we go back to the statute 5 *Geo. 2. c. 7. s. 4.*,—which, though repealed by the 37 *Geo. 3. c. 119.* as to negroes, may still be referred to for the purpose of showing in what light slaves were looked upon by the

legislature of this country, when it dealt with them as property,—we find they are almost in precise words declared to be real estate; for it is there enacted, that “houses, lands, negroes, and other hereditaments and real estates,” shall be liable to payment of debts &c., “and shall be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond &c.” This, therefore, is so strong an expression of the legislature, to show that it considered slaves as real estate, that I think the onus lies on the assignees to prove that they are not real estate; and, I confess, I can hardly think it worth their while to take a reference upon that point.

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Sir J. CAESS.—It is quite apparent, on the face of the deed that was deposited in this case with the petitioners, that the slaves were attached to the land at the time of the equitable mortgage, and must have been then so considered by the petitioners and the bankrupts; consequently, the onus of proof is cast upon the assignees, to show that the slaves were not assigned, or intended to be assigned, as part and parcel of the freehold. It seems to me, also, that the objection taken by the assignees, as to the want of due registration of the slaves, has not been properly established. The assignees stand in the place of the bankrupts, in whose mouth it does not lie to say that the slaves were not duly registered; therefore, until the contrary is proved, we must take it for granted that the contract was duly performed. It need hardly be added, that in consequence of the enactment in the recent statute for the emancipation of the slaves, no sale of those which were the subject of this mortgage can now be legally

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effected; although their labour, as apprentices, may certainly be disposed of, and be lawfully transferred.

Sir G. ROSE.—On the last occasion I intimated my opinion, that the petitioners were entitled to a declaration, that they were equitable mortgagees of these slaves. I am still of the same opinion. My impression has always been, that the view which the profession took of the property in slaves was, that although liable in the hands of an executor for payment of debts, just like an estate *pur autre vie*, they were for all other purposes considered as real estate, or, at all events, they have been so considered in the Island of Antigua. With respect to the point that was urged, of the slaves being in the order and disposition of the bankrupts, this would not depend altogether on the result of the inquiry, whether they were real or personal estate; for the question as to reputed ownership is frequently, not whether the property claimed by assignees is simply a chattel or not,—but, even admitting it to be a chattel, whether it be of such a nature as to draw with it the reputation of ownership to the party in possession of it.

The petition stood over to be mentioned again, as a reference was still pressed for by the assignees.

On this day, however, Mr. G. *Richards* applied, that the Court would direct the order to be drawn up, as it was the intention of the assignees to appeal to the Lord Chancellor.

The Order was made according to the prayer

of the petition, as far as related to the land and *slaves*. But as to the *cattle and utensils*, no order was made, that part of the prayer of the petition having been abandoned by the petitioners (a).

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(a) The petitioners at one time claimed the *cattle and utensils* on the plantation, as part and parcel of the real estate. And in some of the West India Islands, it seems that cattle and utensils on a plantation were, like slaves, considered as affixed to the freehold. But during the argument, the petitioners' counsel abandoned all claim to the cattle and utensils.



Ex parte POWNALL.—In the matter of POWNALL.

Westminster,
January 27.

MR. G. RICHARDS moved, on behalf of the bankrupt, to stay the insertion of the advertisement of adjudication in the Gazette. The adjudication took place on the 25th ult. at Ipswich; and the affidavit of the bankrupt denied the existence of the petitioning creditor's debt; or the committal of any act of bankruptcy. The bankrupt swore, that the money, which the petitioning creditor alleged to be due to him, was not a debt due from the bankrupt, but from Sir *H. Middleton*, for certain goods supplied to him by the petitioning creditor, through the bankrupt's known agency, and for electioneering purposes.

An application by the bankrupt to stay the advertisement in the Gazette, on his own affidavit, merely, denying the existence of the petitioning creditor's debt or the committal of any act of bankruptcy, without any allegation of his solvency, will not be entertained, unless the proceedings are produced for the inspection of the Court.

The COURT intimated, that they could not decide upon a motion of this nature, unless the proceedings were in Court.

Where a bankrupt, after commencing two actions

against the petitioning creditor and the messenger, presents a petition to supersede, the Court will require him to discontinue the actions, before it proceeds to hear the petition. But see next case.

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Mr. *Richards*. The utmost diligence was necessary to effect the object of this motion; and as the proceedings are not in the bankrupt's custody, he had no power of causing their production on the present occasion. In the case of *Ex parte Fletcher* (a), lately before this Court, a similar order to that which is now asked was made, without the production of the proceedings being required. The cases of *Ex parte Foster* (b), *Ex parte Proston* (c), and *Ex parte Fletcher* (d), were also referred to.

ERSKINE, C. J.—This application being made to us, on the ground of there being no petitioning creditor's debt, and no act of bankruptcy, it becomes a question, whether we are to give credit to the deposition of the petitioning creditor, as it appears on the proceedings, or to the present statement of the bankrupt on this petition. The bankrupt's evidence is before us, but that of the petitioning creditor is wanting. How then can we decide to which party most credence is due, without the production of the proceedings? According to my recollection, the Court has never interfered to stay the advertisement in the Gazette, upon the mere denial by the bankrupt of the debt and the act of bankruptcy, where, on inspection of the proceedings, the depositions as to these matters are good upon the face of them. All the cases on the subject show, either that the depositions on the proceedings were defective, or that greater credit was attached to the evidence of the bankrupt, than that of the petitioning

(a) 2 Deac. & Ch. 90, 317, 327.	(c) 1 Rose, 259.
(b) 1 Rose, 49; and S. C. 17 Ves. 414.	(d) Ibid. 336, and S. C. 1 V. & B. 350.

creditor. The cases of *Ex parte Foster* (a), and *Ex parte Proston* (a), when properly examined, will be found to have been decided on one or the other of these grounds. In the case now before the Court, the bankrupt does not even venture to swear, that he is in solvent circumstances; which it is indispensable he should do, when he applies to stay the advertisement. The case of *Ex parte Fletcher*, reported in 2 Deacon and Chitty, and also that of *Ex parte Fletcher*, in Sir G. Rose's Reports, both proceeded on the ground of fraud. In the former, the debt depended on the result of a suit instituted for the purpose of taking partnership accounts, and which was then still pending. And in the latter, the debt appeared to be on a bill of exchange, which had been accepted by the party about to be declared bankrupt, purely for the accommodation of the petitioning creditor himself; and there was also evidence of the petitioning creditor having acknowledged that fact to third parties. In cases of alleged fraud, as observed by Sir G. Rose in *Ex parte Fletcher* (b), we do not want to inspect the proceedings. But in this case, I see nothing at present to justify us in granting the motion.

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Sir J. Cross.—If this had been a petition to reverse the adjudication, under the authority of the 1 & 2 Will. 4. c. 56. s. 17., the result of the application might perhaps have been different. For it is to be observed, with reference to the cases that have formerly come before the Lord Chancellor, that this Court has the power to try the requisites to support a commission or fiat, which the Lord Chancellor in general had not. But here, as

(a) *Supra*.

(b) 2 Deac. & Ch. 317.

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the bankrupt has made no distinct affidavit of his solvency, we should not be justified in granting this application, however inclined we might be to do so. I therefore concur, that we cannot entertain this motion.

Sir G. ROSE.—We have no authority to interfere in the manner now proposed, unless a sufficient case is raised upon the production of the proceedings. It is to be remembered, that the act of parliament is imperative, as to the insertion of the advertisement of the adjudication in the Gazette; and therefore it ought to be a very strong case made out by the bankrupt, to induce the Court to act contrary to this express enactment. It was on the ground of fraud, that the order was made in *Ex parte Fletcher* (a); which, though not distinctly alluded to in the first report of that case, is clearly stated by the Reporters in a subsequent page of the same volume, when a motion was made for rescinding the order (b).

Mr. E. Chitty, as *amicus curiæ*, referred to *Ex parte Ainsworth* (c), where Lord Eldon refused to stay the advertisement in a case like the present, there not being a clear defect in the requisites to support the commission on the face of the proceedings.

Motion refused.

(a) 2 Deac. & Ch. 90.

(b) *Ante*, Vol. ii, 817.

(c) 2 G. & J. 89.

February 6.

Where a bankrupt, after commencing two actions against the petitioning creditor and the

The bankrupt then presented a petition to supersede, and had obtained an order for copies of the depositions on which the adjudication had been made. messenger, presents a petition to supersede, the Court will require him to discontinue the actions, before it proceeds to hear the petition. And see next case.

Mr. *Swanston*, and Mr. *G. Richards*, in support of the petition.

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Mr. *Montagu*, and Mr. *J. Russell*, for the respondents, contended, that as the bankrupt had commenced two actions at law to try the validity of the fiat, one against the petitioning creditor, and the other against the messenger, he could not be heard on the present occasion, unless he would elect to abandon his actions. The Court does not countenance two different modes of proceeding for the same matter, and at the same time. If the bankrupt elected to continue his actions, then the present petition must be dismissed; and if he elected to proceed here, the actions must be abandoned, and he must undertake not to bring any other. This was the course adopted in *Ex parte Jackson (a)*; for, otherwise, the bankrupt might present a petition of this nature, merely to get a sight of the depositions containing the requisites to support the fiat, for the very purpose of upsetting it in an action at law;—a course of proceeding, which this Court would never sanction for one moment.

The COURT observed, that this was the first time that the question had been regularly brought before them; and as the decision of it would establish a rule of practice hereafter, the Judges would confer together before they delivered their judgment. After deliberating for some time,

ERSKINE, C. J. said, that the Court was of opinion, that the bankrupt should undertake to discontinue the

(a) 2 Deac. & Ch. 603.

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Pownall.

present actions, and not to bring any other actions for the same object, without the leave of the Court.

Mr. *Swanston* consented on behalf of the bankrupt, who was present, to give the required undertaking. The case then proceeded; and

The COURT thought, upon the evidence, that the credit had clearly been given to Sir *H. Middleton*, and that the bankrupt had acted avowedly as a mere agent, and was consequently not liable to the debt in question.

The Order was, therefore, that the fiat should be annulled.

Southampton
Buildings,
March 14.

Where a bankrupt petitions to annul the fiat, on the ground of there being no petitioning creditor's debt, nor any act of bankruptcy, the Court cannot compel him to undertake not to bring an action. But see the preceding case.

Ex parte DALY.—In the matter of DALY.

THIS was a petition to annul the fiat, on the ground of there being no act of bankruptcy, nor any petitioning creditor's debt.

Mr. *Swanston* appeared in support of the petition.

Sir G. ROSE.—The petitioner must undertake not to bring an action, if he should not succeed on the present petition. A similar undertaking was required in *Ex parte Pownall*(a).

Sir J. CROSS.—I do not think it should be taken for

(a) *ante*, 723.

granted, that the bankrupt can maintain an action against the petitioning creditor, after he has failed on a petition to annul the fiat. It seems to me, that when this Court, which is a Court of Record, has once adjudicated upon the matter, the same matter could not be litigated in another Court, except in the regular way of appeal to the Lord Chancellor. The question, however, is not at present regularly before the Court.

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Ex parte
Daly.

Mr. Stowton. The Court has no power to impose such terms on the petitioner. In *Ex parte Pownall*, I made no objection, because my client was in Court, and was willing to give the undertaking; otherwise, the Court could not in that case have compelled him to enter into it. The petitioner comes here to ascertain the legality, or illegality, of the fiat. If this Court should hold it to be illegal, he has then a right to recover such damages as a jury may award him in an action. And notwithstanding the decision of this Court may be adverse to him, he has still a right to go round through every Court in Westminster Hall, for the purpose of obtaining the judgment of each Court upon the question. In proceeding under the 1 & 2 Will. 4. c. 56. s. 17. (a) the case perhaps would be different, as the decision of the Court is in that event declared to be final.

Sir G. Ross.—Upon consideration, I do not think we have any jurisdiction to restrain the bankrupt from commencing such actions as he shall be advised. If, indeed, an action was now pending, which involved the

(a) *Ante*, vol. i. Appendix, vi.

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same question as that on this petition, then, as was done in *Ex parte Pownall*(a), we might, like any other Court of Equity, call upon the bankrupt to elect, whether he would proceed with the petition, or the action. But that is not the present state of circumstances. It may be said, however, that as the present petition has been advanced on the application of the bankrupt, and would not otherwise have been heard before next term, we might order it to stand over, until it came on in its regular course, if the bankrupt refused to give the required undertaking; adopting in this instance the former practice before the Lord Chancellor, who retained the petition, and left the bankrupt to bring his action. But I think we ought not to use indirect means to accomplish what we cannot do directly. With reference to the proceeding under the 17th section of the 1 & 2 Will. 4. c. 56., which, however, is not now in question,—as the bankrupt here simply prays, that the fiat may be annulled, and not a reversal of the adjudication,—I really cannot understand what the legislature intended by that enactment. I can only say, that I should never advise a bankrupt to have recourse to the remedy provided by that section; for the bankrupt is there bound by a final decision in the first instance.

The rest of the Court concurred.

The case was then proceeded with, without any undertaking being required.

(a) *Suprà*.

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Ex parte WILLIAM BARRETT.—In the matter of JOHN CHARLES BARRETT.

*Westminster,
May 7.*

THIS was the petition of an assignee, who was also the petitioning creditor, praying to confirm the certificate of the Deputy Registrar, made in pursuance of two several orders of this Court, referring to him several bills of one *George Cook* to be taxed, and directing that if it should appear that *Cook* was overpaid, he should then refund to the petitioner what he was so overpaid. On the 15th July 1833, the Deputy Registrar made a certificate of what he had done in pursuance of the first order, whereby he certified that he had considered the several bills, three in number, one amounting to the sum of 195*l.* 15*s.* 8*d.*, which he had taxed and allowed at the sum of 121*l.* 18*s.* 2*d.*,—another amounting to the sum of 78*l.* 1*s.*, which he had taxed and allowed at the sum of 60*l.* 11*s.* 7*d.*,—and a third, amounting to the sum of 14*l.* 11*s.* 3*d.*, which he had taxed and allowed at the sum of 5*l.* 8*s.* 6*d.*

An order was made for the taxation of four several bills of a solicitor for various business done for the same assignee, under which more than a sixth part was taken off the gross amount of the four bills, but not off the amount of every one of the bills. *Held*, that as all the bills were incurred by the same person, in the same right, there was no need for a separate order of taxation for each bill,—and that, as more than a sixth was taken off from the whole amount, the solicitor must pay the costs of taxation.

By a further order, made on the petition of the petitioner, dated 25 November 1833, the certificate of the Registrar was sent back to him to be reviewed.

On the 21st February 1834 the Registrar made his further report, whereby he certified that in pursuance of the last-mentioned order he had reviewed his former certificate, and that the result of such review was, that he had taxed and allowed the three several bills of costs in that certificate mentioned, at the sums of 164*l.* 1*s.* 8*d.*, 60*l.* 11*s.* 7*d.*, and 5*l.* 8*s.* 6*d.* respectively. And he further certified, that *George Cook* had duly accounted before him, on oath, for all sums of money received by him in respect of the several bills, and that

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Ex parte
BARNETT.

it appeared that he had been overpaid in respect thereof by the sum of 8*l.* 1*s.* 1*d.*, which sum was then due from him to the petitioner.

In addition to the three bills mentioned in this certificate, the Deputy Registrar, under the last-mentioned order, taxed a fourth bill, amounting to 26*l.* 9*s.* 1*d.*, which had not undergone any taxation under the first-mentioned order, but was on that occasion totally disallowed by the Registrar on the ground that it was not then proved before him, that the petitioner had undertaken to pay it. This last bill was now taxed at the sum of 17*l.* 17*s.* 3*d.* The aggregate amount of the four bills so taxed and reviewed was 314*l.* 17*s.*, and the amount taken off on the taxation was 66*l.* 18*s.*, being considerably more than a sixth part of the sum of 314*l.* 17*s.*

The petitioner prayed, that the last certificate of the Deputy Registrar might be confirmed, and that *George Cook* might be ordered to pay to the petitioner the sum of 8*l.* 1*s.* 1*d.*, so certified to be due from him, together with the costs of obtaining the two several orders of taxation, and of the proceedings consequent thereon, and of this application.

Mr. *Swanston*, for the petitioner. The rule as to costs of taxation, where more than one-sixth is taken off, ought to be applied in this case not to each bill separately, but to the aggregate amount of the whole. For, although there are several bills, the taxation of them being under one order, they virtually become but one bill, for the purpose of the present petition.

Mr. *Koe*, for the respondent Mr. *Cook*. The rule, as to the costs of taxation, ought to be applied to each

of these bills separately; therefore, as one sixth has not been taken off the bill for 195*l.* 15*s.* 8*d.*, which forms the greater item in the account, the respondent is not liable for the costs. The bills, too, were incurred in separate and distinct transactions, and can hardly be said to form one bill. The bill for 195*l.* 15*s.* 8*d.* was due, for business done by the solicitor in this bankruptcy for the petitioner, as petitioning creditor and assignee; that for 78*l.* 1*s.* was for conveyancing business transacted for the petitioner, as mortgagee of the bankrupt; and that for 14*l.* 11*s.* 3*d.* is for the costs of an action at law. All three transactions were quite independent of each other, and have been so treated by the parties; and the Registrar, it appears, has regarded them in like manner.

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ERSKINE, C. J.—The rule, as to the taxation of an attorney's bill, is the same in all the Courts of Westminster Hall, whether of common law or equity (a). But it is said, that these four bills are to be taxed separately, as they are for several distinct matters. If, indeed, one of these bills had been due from the petitioner in the character of petitioning creditor, and another from him and another person, as assignees, (supposing there had been two assignees,) then there might be some ground for the argument advanced by the respondent. But as the bills are all due from the same person, in the same right, it appears to me that they must be taken but as one bill, for the purpose of taxation; otherwise, we might have the account of an attorney split into as many distinct bills, as there are

(a) See 1 Tidd Pr. K. B. 337, 5th ed.; 1 Turn. & V. Pr. in Chan. 864; 1 Chit. Arch. Pr. 51.

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days mentioned in it on which the business was done. I therefore think, that the aggregate amount of the sums struck off the different bills must be deducted from the gross amount of those bills ; and as the amount so taxed is less by a sixth part (a) than the whole amount of the bills delivered, the solicitor in this case must pay the costs of taxation.

Sir J. CROSS concurred ; observing, however, that if the bills had been proved to have been incurred in totally distinct matters and rights, he should have entertained some doubt on the subject. But in the present case he had none.

Sir G. ROSE.—It is hardly possible, that a state of circumstances, similar to those arising on this petition, should not have often previously occurred in bankruptcy ; and yet it is remarkable, (and it affords a strong inference, though certainly not conclusive against the present argument of the respondent's,) that the point now raised was never ventured upon before. There can be no doubt but that these four bills would have formed one entire ground of action, which right of action is restrained by the single order of this Court, directing all four bills to be taxed. Had the bills been incurred in distinct and separate rights, then four orders of taxation would have been requisite, and as many orders to restrain actions at law upon them. The petitioner, in my opinion, is entitled to an order, pursuant to the prayer of his petition.

Ordered accordingly.

(a) See 2 Geo. 2. c. 23., made perpetual by 30 Geo. 2. c. 19. s. 75.

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**Ex parte RICHARDSON.—In the matter of CONSETT
and LEIGH.**

*Westminster,
April 14.*

THIS was a motion, that the Deputy Registrar might be directed to review his certificate as to the taxation of certain bills of costs, which, by an order of this Court, dated the 13th March last, were referred to him to be taxed.

An application, that the officer of the Court may be directed to review his certificate as to the taxation of costs, may be made by motion.

Mr. *Swanston*, and Mr. *Montagu*, were in support of the motion.

It is not an objection to such application, that the amount of the taxed costs has not been paid into Court; though it may be proper to make such payment one of the terms of the order for re-taxation.

Mr. *J. Russell* appeared for an assignee, who had long since been discharged from the trust, and objected that the application ought to be by petition, and not by motion. The certificate of the Registrar in this Court is equivalent to the report of a Master in Chancery; and the practice there is not to deal with a Master's report on motion. If any objections are taken to it, one of two modes must be pursued; the one is, to file a petition of exceptions, specifically stating the objections urged to the report. This practice is recognized by the cases of *Pitt v. Mackreth* (a), *Lucas v. Temple* (b), *Holbecke v. Sylvester* (c), and *Purcell v. M'Namara* (d), and is the preferable mode of proceeding. The other mode is, to present a petition for liberty to except; and, that being obtained, to file then the specific exceptions intended to be relied on, as was the course in *Fenton v. Crickett* (e), and *Wright v. Southwood* (f). This last case also points out the reason why a mere motion

(a) 3 Bro. C. C. 321.

(b) 9 Ves. 299.

(c) 6 Ves. 417.

(d) 12 Ves. 170.

(e) 3 Mad. 496.

(f) 1 Y. & J. 420.

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for this purpose ought not to be entertained ; namely, that the Court requires to be specifically informed of the grounds on which the party applies for an order on the Master to review his report ; and this can only be done satisfactorily on petition. In *Jenkinson v. Royston* (a), where a *motion* was made for liberty to file exceptions, founded on a previous notice, stating merely in general terms that such a motion would be made, and that certain affidavits would be used ; the Lord Chief Baron said, “ In this case I think it is unnecessary to inquire what has been the practice, which seems to be doubtful ; we may proceed on principle, and the reason of the thing. The Master has made his report ; a motion is then made for leave to except. We must suppose the Master to be right ; and the Court ought not to give leave to except, without being informed what are the exceptions intended to be taken, and on what they are founded. They may be frivolous and idle, and without any sort of foundation ; and it is a proceeding calculated to create injurious delay. These exceptions only state, that the Master, having reported as he has done, ought to have reported otherwise. But that gives us no information ; it is not stated, *why* he should have reported otherwise,—or wherein he has done wrong,—or why, if he had reported otherwise, he would have done right. The whole proceeds on mere assertion. Before I make an order that the Master review and alter his taxation, as I am in effect required to do, surely I ought to have some reasonable grounds for making such an order. Not being apprised of there existing any good cause for making such an order, I certainly shall do no such thing.”

(a) 9 Pri. 215, 216, note.

This then being the settled practice in equity, it seems difficult to understand why a different course should be pursued in bankruptcy ; more especially as this was the course adopted in bankruptcy before the establishment of this Court ; and one of the first orders of this Court after its establishment was, that the practice formerly adopted should be conformed to as much as possible (a). The evils of departing from this practice must be equally detrimental to justice in one Court, as in the other. Suppose, upon mere motion, without any ground of objection stated, the Registrar is directed to review his certificate ; the consequence will be, that he has no means whatever of knowing in what respect he has done wrong, and of course must retrace his steps, in total ignorance of the reason of such a task being imposed on him. [*Erskine*, C. J. You never bring the Registrar's certificate, as to costs, before the Court to be confirmed. Does any mode of objecting to the certificate exist, except by motion ? Besides, as affidavits must be filed in support of the motion, has not the Registrar the means of knowing the objections made to his certificate, by a perusal of the affidavits ?] That is the very evil and inconvenience of which we complain. It is never usual for a Registrar, or other officer of the Court, to have recourse to such a mode of procedure to ascertain the facts, in a question of this description. These should come before him in a compact form of statement, such as by petition ; for it is impossible he can properly perform his other duties, if his time is to be taken up, first in reading through all the affidavits in support of a motion, and then those in reply, and

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(a) See the General Orders, 12th January 1832, Ord. 35, *ante*, vol. i. xxix. Appendix.

1834. perhaps others in rejoinder and surrejoinder,—so that
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Ex parte no limit could be assigned to his labour; which, if the
RICHARDSON. practice by petition be adhered to, may be confined to
a very few lines of plain statement.

Another objection to the present motion is, that the amount of the taxed costs has not been paid into Court, as it ought to have been, according to the authority of *Ex parte Leigh* (a), where the Vice-Chancellor held, that an application like the present, being in the nature of an appeal, the petitioner must pay into Court the sum at which the costs were taxed.

Mr. *Ching* appeared for the continuing assignee. In bankruptcy the only proceeding of record is by petition, stating all the facts and grounds of coming before the Court; and therefore, that is the only mode by which an officer of the Court can tell what is the subject-matter of a reference made to him, or can know how to correct any error he may have committed, when a matter previously referred is sent back to him for revision. Another evil not yet pointed out to the Court is, that we are brought here by a general notice of motion, of the nature and grounds of which we know nothing. We are therefore compelled to come here at a great expense, to discover merely what case, or if any case, may be made against us; while, if a petition had been presented stating the objections to the certificate, we might then have exercised a discretion, as to whether it would be our duty to submit at once to the objections, or to contest them.

Mr. *Swanston*, and Mr. *Montagu*, contra. The

(a) 4 Mad. 394.

objection to the proceeding by motion, because the grounds, upon which a review of the certificate is sought, are not stated for the information of the respondents, is not tenable; for the affidavits, which have been previously filed, and which the other side have had ample opportunity of becoming acquainted with before this motion was made, disclose very fully the nature of the objections that would be made to the certificate; and there is, besides, no authority to show, if the proceeding had been by petition, that the whole of the facts must necessarily have been stated. A petition might have been drawn as concisely as the present notice of motion. But if the notice of motion is held to be too general, it may easily be amended, so as to embrace all the objections to the certificate. There can therefore be no reason why the relief now sought should not be granted on motion, as well as on petition, and indeed why it should not be held to be the more preferable mode of proceeding; as there is always considerable more delay in proceeding by petition, than by motion. It has been said, that it is contrary to the practice of the Court of Chancery to hear an application of this nature on motion, and that it requires either a petition stating the exceptions, or a petition for leave to except, and then to file exceptions. But what is the practice here? In *Exp. Crockwell (a)*, this Court expressly held that there was no necessity to apply for leave to except to the report of the officer of the Court, notwithstanding it had been usual to do so when the reference was to a Master in Chancery. So that, in this instance, the practice of this Court decidedly differs from that of the Court of Chancery. By the 1 & 2 Will. 4. c. 56. s. 3., it is competent to

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(a) 1 Dea. & Chit. 546.

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this Court to hear and determine any matter, either by petition, or by motion; and why is the present case to be made an exception to the general authority given to this Court by that statute? In Courts of Law an application of this nature is always made by motion; and this Court, being constituted a Court of Law, as well as one of Equity, would rather be inclined to adopt that course of practice which is least expensive to the suitors; and this, it cannot be denied, is to proceed by motion.

Mr. *Russell*, in reply. The case of *Ex parte Crockwell*(a) is no authority for saying, that exceptions are unnecessary on the present occasion, and that a mere motion is sufficient. The extent of that decision is, that there need be no previous petition for leave to except, but that the petition to confirm the report, and the exceptions taken to it, might both come on to be heard together. In taking any objection to the judgment of an officer of the Court, it is generally the practice to state specifically the grounds of objection, before it is brought before the Court for argument, as in the case of *Parcell v. M'Namara*(b); and mere general exceptions have always been discouraged. So in the case of *Wright v. Southwood*(c), which occurred in the Court of Exchequer, although it is the practice of that Court to proceed by motion, it was held nevertheless, that a motion for leave to except must be supported by affidavit, stating the precise grounds of objection, in order to warrant the interference of the Court in permitting subsequent exceptions to be taken. In bankruptcy, upon the petition of a creditor for liberty to prove, which is in the na-

(a) *Suprà*.

(b) 12 Ves. 166.

(c) 1 Y. & J. 420.

ture of an appeal from the judgment of the Commissioners, it has always been held, that the petition must state the grounds of the rejection of the proof by the Commissioners; *Ex parte Wilson*(a), *Ex parte Schmaling*(b). It is a bad argument to say, that it is sufficient to state the nature of the objections in the affidavits; for it is a well-known maxim of all the Courts, that oaths ought not to be multiplied. Affidavits should only be used to support a case already stated by a previous proceeding, and not as a means of stating the case itself(c). [Sir G. Rose. Would not these latter observations equally apply, if a petition were resorted to? This does not seem to me to be a case where exceptions are necessary; for it is not required to except to a report, where the error appears on the face of the report itself. This, I understand, from a note of Mr. Barber(d), was held by the Vice-Chancellor in *Ex parte Farquhar*, in the matter of *Starkey*, on the 17th June 1831. Mr. Barber's note stands thus:— "V. C. It is not necessary to except in the regular way, if it appear on the face of the report that the Master is wrong, the Court can decide."] [*Erskine*, C. J. As, for instance, where there is an inconsistency between the order of reference and the report.] If, on motion, this relief is to be obtained, there can be no restriction on the practice of seeking relief in other cases in the same manner, to the great injury and vexation of respondents; for they must come prepared, as we must be in this case, to discuss every item of the bill that has been ordered to be taxed; while in proceeding by petition, the petitioner would be confined to the objections stated in his petition.

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 RICHARDSON.

(a) 1 Cox, 308.

(b) Buck, 93.

(c) And see *Ex parte Wyatt*, ante, 665.

(d) The Registrar.

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RICHARDSON.

ERSKINE, C. J.—The principle contended for in this case, on behalf of the assignees, does not seem to me to apply to the state of circumstances under which the case is brought before the Court. Where a matter is referred to the Master, and he is required to make his report; which, after it is made, one party seeks to have altered,—in that case, no doubt, a petition for leave to except, or a petition at once stating the grounds of exception, is commonly resorted to in practice. But this is a mere question, whether the order of this Court, referring it to Mr. Gregg to tax certain bills of costs, has been duly complied with,—a question, which the Court is fully competent to decide, by merely referring to and comparing the order and the certificate; and I therefore cannot see why it should be necessary to file any exceptions at all to the certificate. If, indeed, there were any positive rule in the Court of Chancery requiring a petition of exceptions in such a case, I might then pause before I held myself justified in departing from it. But it only appears that a petition has been the usual course, and no one authority has been adduced prohibitory of the practice of proceeding by motion. Indeed the case cited of *Wright v. Southwood*(a), in the Exchequer, almost forms a precedent for our course of proceeding on the present occasion; for there the application for leave to except was made on motion and affidavit; and coupling that decision with the case of *Ex parte Crockwell*(b), decided in this Court, we are furnished pretty nearly with an authority for the practice we ought to adopt on this occasion. Looking, therefore, at the act of parliament by which this Court was constituted, and finding that

(a) *Supra*.(b) *Supra*.

a discretion is there given to us to hear matters either by motion, or petition, I think it is a fair use of that discretion to hold, that this application may be made by motion; as that mode of proceeding is not only the more convenient and expeditious, but also the less expensive course. And as to the objection urged, of the notice of motion being calculated to deceive, and take a party by surprise, that could be easily obviated, by the Court ordering the hearing of the motion to be postponed, and, if necessary, an amendment of the notice, so as to render it more certain and specific.

With respect to the objection, that the costs have not been paid into Court, I cannot admit that the case of *Ex parte Leigh*(a) lays down any such general rule as has been contended for by the counsel opposed to this motion. It seems to me to be a case decided on its own peculiar merits, and not intended to form any general precedent for subsequent decisions. It ought, indeed, scarcely to have been reported in its present shape. Besides which, I find, on reference to the Registrar, that it is not the usual practice in such cases to pay into Court the sum at which the costs have been taxed.

Sir J. CROSS.—At present, the Court knows nothing of the report complained of; and before it has an opportunity of looking into it, to consider whether it is satisfactory or not, the assignees start a preliminary objection, that in no case can this Court determine a question like the present, except upon petition. In support of this proposition several cases have been cited, to show the universality of the rule, that the Court has no jurisdiction, on motion, to review a re-

(a) *Supra*.

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port as to the taxation of costs. None of those cases, in my opinion, apply to this particular case now before the Court, whatever guide they may afford to the practice in equity. It is for the assignees to show, that we have no power to proceed by motion, under the existing circumstances of this case. And this, I think, they have both failed to do. The Bankruptcy Court Act clearly gives us a power to hear and determine matters, either on motion, or petition, at our discretion. It is said, however, that the general order we made, in the beginning of our jurisdiction, as to adhering to the former practice in bankruptcy, deprives us of the power of exercising any discretion on the subject. I cannot go along with the assignees to this extent, even supposing there was such a rule as is now contended for, according to the former practice in bankruptcy. But it does not appear to me, that any such rule ever existed before the establishment of this Court. And however that may be, this Court could never have intended, by the general order alluded to, to nullify the discretionary power given to it by the act of parliament, and to hold that every matter, trivial as it might be, must nevertheless be heard by petition, and by no other mode whatever. But it has been pressed upon us in argument, how great the inconvenience would be, to entertain this subject on mere motion. I confess it appears to me, that all those inconveniences are amply counterbalanced by the decrease of delay and expense, that will be effected by our proceeding on motion in a case of this description, in preference to proceeding by petition. Besides which, it is not to be forgotten, that this mode of proceeding

is not peculiar to this Court, but is the every-day practice in Courts of Law.

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Sir G. ROSE.—I think this Court has clearly jurisdiction to hear this matter on motion. But if it had not, there is a petition already in the matter before the Court, namely, that on which the original order of reference to the Registrar was made; and that is sufficient to ground a subsequent motion. I am of opinion, however, that if there had been no previous petition, we ought, on the present occasion, to exercise the power we possess, of hearing this case on motion. Although it was the general practice of the Court of Chancery, when sitting in bankruptcy, to require a petition, still no one will deny that motions were occasionally resorted to,—as, for instance, to stay an attachment for non-payment of costs, notwithstanding it might become necessary to review the taxation of the costs, the non-payment of which was the foundation of the attachment. And in such a case as the present, which must of course always be strongly contested on both sides, there was no reason why a motion should not have answered every purpose. The only objection to this mode of proceeding before the Lord Chancellor was, that an order on a contested motion could not have been so regularly drawn up, as if there had been a petition, from which the facts and merits of the case could be more conveniently deduced. But that difficulty arose, in a great measure, from the Lord Chancellor, when sitting in bankruptcy, not having registrars or officers to whom bills of costs were referred for taxation, separate from those of the Court of Chancery. The new act, however, expressly gives us power to

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hear matters by motion; and, therefore, no objection can now be made to the drawing up of any order of this Court on motion.

In alluding to the argument, *ab inconvenienti*, which has been urged against this mode of proceeding, it is wrong to suppose that if a petition had been presented in this case, it would necessarily have contained the petitioner's case, as well as his reasons and arguments against the certificate of the Registrar. It would not, and ought not, in my opinion, to have contained more than a mere outline of his case, leaving the rest to be shown by affidavits. A petition, therefore, in a case of this description, can only be required for the convenience of the Court, and for the purpose of better preparing its mind for the consideration of such measures as are intended to be argued before it.

The objection, as to the non-payment of the taxed costs into Court, might form a good reason why the party should not be permitted to avail himself of any Order we may make on this motion; and it may be proper to make the payment of the costs into Court one of the terms of the Order for re-taxation, if the assignees require it. But I do not think it can be entertained as a preliminary objection to the motion.

The objections were therefore overruled, and the case proceeded.

Ex parte BEAGUE.—In the matter of SCHONSWAR.

1884.

Westminster,
May 6.

IN this case a joint fiat was issued on the 18th February 1833 against two of three partners, directed to country Commissioners, and a docket had been struck by the same petitioning creditor on the 2d May in this year, for the purpose of issuing a separate fiat against the third partner; the petitioning creditor being a joint creditor of the three.

A second fiat issued against one of several partners, after a previous fiat against the other partners, cannot now be directed to the same Commissioners as those named in the first fiat, under the 6 Geo. 4. c. 16. s. 17; but must be directed to the new Commissioners appointed under the 1 & 2 Will. 4. c. 56. s. 14.

Mr. Swanston now moved, on the part of the petitioning creditor, that the separate fiat intended to be issued might be directed to the same Commissioners as those who were named in the first fiat. It is provided, by 6 Geo. 4. c. 16. s. 17. that if, after a commission issued against two or more members of a firm, any other commission shall be issued against any other member of such firm, the last commission shall be directed to the Commissioners to whom the first was directed; and that immediately after the adjudication under the last commission, the Commissioners shall convey and assign all the estate of the bankrupt to the assignees chosen under the first commission. The only difficulty in the way of this application is, that new Commissioners have been appointed to act for the district where the first fiat has been worked, under the provisions of the 1 & 2 Will. 4. c. 56. s. 14., and that the former fiat is directed to Commissioners who are not in the new list. That statute, after directing that the judges who go the circuits shall return the names of persons, for the approval of the Lord Chancellor, to act as Commissioners in the country, enacts, that all fiats “not directed to the Court of Bankruptcy, shall

1834.

**Ex parte
BRAGUE.**

be directed to some one or more of such persons in rotation, to act as Commissioners of Bankrupt, according to the districts or places for which such persons shall be so returned, *and to no other person than such as shall be included in such return.*" This enactment, however, it is submitted, applies only to original commissions and fiat, and not to derivative or supplemental ones; and it is to be remarked, also, that it contains no terms of repeal in regard to the previous provision of the 6 Geo. 4. c. 16. s. 17. [*Erskine, C. J.* The words in the last act are exclusive, "and to no other person."] In the 39th and 40th sections of the act, which relate to the removal of pending commissions into the Court of Bankruptcy, and to the appointment of official assignees, there are no express directions as to country commissions, but merely as to London commissions. The omission in the 39th section of the new act lays a foundation for the present application, under the 17th section of the 6 Geo. 4. c. 16. If the separate fiat, in this instance, be directed to different Commissioners from those to whom the first fiat was directed, it may be productive of great inconvenience and contrariety of decision; which evils were intended to be remedied by the 1 & 2 Will. 4. c. 56. [*Cross, J.* There is nothing to prevent the Commissioners, to whom the last fiat may be directed, from assigning the bankrupt's estate and effects to the same assignees as have been chosen under the first fiat.] There is nothing in the act that requires country Commissioners to do so; although there is a provision of this nature in the 40th section of the act, which is applicable to London commissions.

ERSKINE, C. J.—It is quite impossible,—after referring

to the 14th sect. of the 1 & 2 *Will.* 4. c. 56., and finding it to be there expressly enacted, "that the fiat or fiats aforesaid, not directed to the Court of Bankruptcy, shall be directed to some one or more of such persons, in rotation, to act as Commissioners of Bankrupt, according to the districts or places, for which such persons shall be so returned, and to no other person than such as shall be included in such return,"—that this Court can order the second fiat to be directed to the Commissioners named in the former fiat; for this would be acting entirely in contravention of the provisions of the act.

1884.

Ex parte
BRADSHAW.

Sir J. Cross.—The point is so important, that I think it is worthy of further consideration, and shall therefore, for the present, decline giving any opinion.

Sir G. Rose.—Whatever were the provisions of the former statute of 6 *Geo.* 4. c. 16., the last act renders it impossible, that a second fiat, intended to be executed in the country, can be directed to any Commissioners but those appointed under the 14th section of the new act. The better plan, perhaps, will be to proceed with the working of the second fiat, until the choice of assignees, there being little doubt that the same will be chosen, as those under the former fiat. The assignees may then apply for the directions of the Court, and for the suspension of further proceedings under both fiats, until those directions are given.

No. Order made; it being understood that the petitioning creditor would adopt this recommendation of the Court.

1834.

Westminster,
May 5.

Where bills of exchange, proved under a fiat, have been lost by the creditor, and he therefore cannot produce them, for the purpose of receiving his dividends, and an application to this Court becomes necessary to receive them, the creditor must pay the costs of the application.

Ex parte TRUST.—In the matter of HARTSINCK.

THIS was the petition of a creditor, that the dividends on two bills of exchange, which he had proved under the fiat, might be paid to one *Joseph Brown*, to whom the petitioner had given a power of attorney to receive them from the assignees. The bills had been lost by the petitioner, and the assignees objected to pay the dividends, without the production of the bills. The petitioner had made an affidavit, that the whole sum was due to him on the bills, and that he had offered to indemnify the assignees against any loss they might sustain from paying the dividends, without the bills being produced.

Mr. *Swanston*, in support of the petition, said, that the only question in this case was, as to which party should pay the costs.

Mr. *Rudall*, for the assignees, observed, that there was another question, namely, that as a power of attorney is vacated immediately on the death of the party who had given it, the present power might thus have been rendered nugatory, as there was nothing to show that the petitioner in this case was still alive.

The COURT said, that they had made a general rule, that the official assignee should not pay the dividends under any fiat, without the production by the creditor of the securities mentioned in his proof; and that as it was by the creditor's own act, in this case, that the securities were lost, it was reasonable that he should

bear the costs of this application. It was ordered, therefore, that the dividends should be paid to the person appointed under the power of attorney, upon a proper indemnity being given to the assignees, and upon an affidavit being made that the creditor, who had given the power of attorney, was still alive; and that the costs of the assignees should be deducted out of the dividends.

1834.

Ex parte
TRUST.

Ex parte CHARLES LAMPON.—In the matter of
CHARLES LAMPON.

THIS was an application for an *habeas corpus*, with a view to discharge the bankrupt from a commitment made by two of the London Commissioners, under the following warrant.

Coram
Lord
Chancellor.
Private Room,
House of Lords,
May 10, 1834.

A bankrupt, having been committed by one of the London Commissioners to the custody of the messenger, for not answering satisfactorily, was brought up before two Commissioners, and committed by them to Newgate: Held, that the commitment was illegal; inasmuch as the bankrupt ought to have been brought up and re-examined before a Subdivision Court, consisting of three Commissioners, who must be all present at such re-examination, though they need not be

“In the Court of Bankruptcy.

“21st day of March 1834.

“Whereas a fiat in Bankruptcy, bearing date the 3d day of February 1834, was awarded and issued, and is now in prosecution against *Charles Lampon*, of Tyer’s Gateway, in the parish of Saint Mary Magdalen, Bermondsey, in the county of Surrey, fellmonger, dealer, and chapman, under which the said *Charles Lampon* hath been duly found and declared a bankrupt: and whereas, at an examination of the said bankrupt, taken before us, *Joshua Evans*, Esq., and *John Samuel Martin Fonblanque*, Esq., two of the Commissioners of the said Court of Bankruptcy, the

unanimous in the sentence of commitment.

On an application for a bankrupt’s discharge by *habeas corpus*, an affidavit may be read stating circumstances, which are not set forth in the warrant of the Commissioners.

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Ex parte
LAMPON.

following answers to the questions put to him, on oath, were made by the said *Charles Lampon*, as follows:

“ At a meeting before *Joshua Evans*, and *John Samuel Martin Fonblanque*, Esqrs., at the Court of Commissioners of Bankrupt, on the 21st day of March 1834.

“ In the matter of *Charles Lampon*, a bankrupt.

“ *Charles Lampon* examined.

“ Q. What money did you receive on the 1st day of February last?—I tell you, as I told you before, I do not know what I received on that day; it was about £200.

“ Q. What have you done with the money?—I have nearly spent all in living, and going about to places where I ought not to have gone; but I was driven away from home; for I knew if I had gone there, I should have been arrested.

“ Q. How much money have you now left out of the £200?—Not £5.

“ Q. Do you mean to say you have spent all the £200 except the £5?—I have; it is all gone, spent, or lost; it is all gone.

“ Q. Can you give any other account of the £200, except this you have mentioned?—I cannot at present, as I am not prepared, as I told you before.

“ Q. Have you any further account to give?—I have not at present.

“ *Charles Lampon*.

“ Now we, the said Commissioners, considering such answers to be wholly unsatisfactory to us, these are

therefore to require and authorize you, immediately, on the receipt thereof, to take into your custody the body of the said *Charles Lampon*, and him safely convey to his Majesty's prison of Newgate, and him there to deliver to the keeper of the said prison, who is thereby required and authorized, by virtue of the said fiat, and of the statutes now in force concerning bankrupts, to receive the said *Charles Lampon* into his custody, and him safely keep and detain, without bail, until such time as he shall answer to our satisfaction the said questions. Given under our hands and seals, this twenty-first day of March one thousand eight hundred and thirty-four.

“ *Joshua Evans.* (L. S.)

“ *John S. M. Fonblanque.* (L. S.)

“ Commissioners.

“ To *Thomas Hamber*, our messenger, and his assistants; also to *William Wadham Cope*, the Keeper of his Majesty's Gaol of Newgate, or his deputy.”

By an affidavit, made by the petitioner in support of the application, it appeared that on the date of the warrant the bankrupt attended at the Court of Commissioners of Bankrupts, for the purpose of surrendering, and submitting himself to be examined by Mr. Commissioner *Merivale*, to whom the fiat was directed; but it so happened that Mr. *Merivale* was not then in attendance. In consequence of this the bankrupt attended before Mr. Commissioner *Evans*, and surrendered himself under the fiat, and was duly sworn, and submitted himself to be examined by Mr. *Evans*.

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The 21st of March, being the forty-second day on which the bankrupt was required to finish his last examination, and being then not prepared to do so, he applied to the Commissioner to grant him a month's further time for that purpose; but the Commissioner only granted him a fortnight, and his protection from arrest merely from day to day. After this determination of the Commissioner, Mr. *Drew*, the solicitor for the assignees, requested permission to examine the bankrupt; and he was accordingly examined by him for a considerable space of time, and part of his examination was reduced into writing, and signed by the bankrupt. The Commissioner was several times dissatisfied with the answers given by the bankrupt, and often threatened to commit him; and at the conclusion of the examination the Commissioner did actually commit the bankrupt to the custody of the messenger, and the bankrupt was removed to an adjoining room. After a short time had elapsed, he was brought up again before Commissioners *Evans* and *Fonblanque*, when his examination was continued, and, after a short examination, he was committed to Newgate, under the above warrant.

Mr. *Russell*, in support of the commitment, objected to any affidavit of the bankrupt being read, contending that the Court could not travel out of the warrant, in discussing the validity of the commitment.

Mr. *Swanston*, and Mr. *Montagu*, on behalf of the bankrupt, contended, that where the discharge of the prisoner depended on a fact not shown on the face of the warrant, affidavits were clearly admissible to state

and explain that fact. In *Power's case* (a), and in *Coomb's case* (b), affidavits were admitted by Lord *Eldon*, where the warrant was not fully set forth in the return. Here the affidavit discloses an important fact, not appearing in the warrant, namely, that the bankrupt was only examined by one Commissioner, although two committed him.

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Lord BROUGHAM, C.—Certainly, affidavits may be read for the purpose of showing circumstances not set forth in the warrant; otherwise, the grossest injustice might be occasioned either from carelessness, or design; for there would be nothing to prevent Commissioners from making up a warrant, either false or faulty; and, as the London Commissioners are constituted Judges of Record, no action would lie against them for the consequences of such an act.

Mr. *Swanston*, and Mr. *Montagu*, then, after reading the affidavit already stated, contended that the commitment was invalid. In the first place, the Commissioners did not sufficiently examine the bankrupt, to justify their conclusion, that his answers were not satisfactory. 2dly. The bankrupt, after he had been examined and committed by one Commissioner to the custody of the messenger, was not brought up before a Subdivision Court, pursuant to the directions of the statute(c). 3dly. The examination, stated in the warrant, refers to a former examination, which is not set out in the warrant. 4thly. It ought to have been stated in the war-

(a) 2 Russ. 584.

(b) 2 Rose, 398.

(c) 1 & 2 Will. 4. c. 56.

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LAMPON.

rant, that the bankrupt was previously committed by one Commissioner to the custody of the messenger. 5thly. The concluding part of the warrant is defective, inasmuch as it ought to have followed the words of the statute, 6 *Geo.* 4. c. 16. s. 36., viz. “until he shall submit himself to the said Commissioners to be sworn, and full answers make, to their satisfaction, to such questions, &c.”

In *Ex parte Bardwell*(a) the Lord Chancellor said, that the 1 & 2 *Will.* 4. c. 56. s. 7., intended to give the party under examination the security of three judges being present, to preside over his examination, and to form their opinion upon hearing and seeing him answer the questions put to him.

LORD BROUGHAM, C.—As this warrant is signed by two Commissioners only, it appears to me *primâ facie* wrong; I shall therefore call on the counsel, who appears in support of this commitment.

Upon the subject of commitment, under the bankruptcy jurisdiction in general, I must express how greatly I feel it my duty to see that the provisions of the legislature are properly pursued; seeing that the remedy in the shape of damages for an illegal commitment, which formerly existed, is now taken away by the remodelling of the bankrupt laws. Before the act of 1 & 2 *Will.* 4. c. 56. was passed, I took considerable pains with this very part of it myself.

Mr. *J. Russell.* If two Commissioners have not power to commit, then I contend that there is no jurisdiction for that purpose in any case under the act.

(a) 1 Mont. & Ayr. 193.

The words of the 7th section of the 1 & 2 Will. 4. c. 56., are, "that in every bankruptcy, prosecuted in the said Court of Bankruptcy, it shall and may be lawful for any one or more of the said six Commissioners to have, perform, and execute, all the powers, duties, and authorities, by any act or acts of parliament now in force, vested in Commissioners of Bankrupt, in all respects as if they, or any one or more, were in every instance specially authorized and appointed for the purpose, by a separate commission, under the Great Seal of the United Kingdom of Great Britain and Ireland." If the clause had stopped here, no doubt could exist that a single Commissioner would have had power to commit, just the same as three Commissioners would have had under the old jurisdiction. But the section goes on to provide, "that no *single* Commissioner shall have power to commit any bankrupt, or other person examined before him, otherwise than to the care and custody of a messenger or other officer of the said Court, to be by him detained in his custody, and brought up before a Subdivision Court, or the Court of Review, within three days after such commitment, for which purpose one of such Courts shall be forthwith assembled, and to which Court such examination shall be adjourned." [Lord Brougham, C. The single Commissioner is therefore only authorized to commit to the care and custody of the messenger. If it be intended to commit to Newgate, a Subdivision Court must be summoned, which, by section 6, must consist of three Commissioners. There is nothing in the act that authorizes *two* Commissioners only to commit to Newgate.] The 7th section merely restricts commitments by *one* Commissioner; but it does not

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Ex parte
LAMPON,

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say, that *two* Commissioners shall have no power to commit. If two Commissioners have not this power, then there is no power of commitment given by the act; for there are no words to be found in it authorizing the Subdivision Court to commit. [Lord *Brougham*, C. The 7th section directs, that the party in custody of the messenger shall be brought up before a Subdivision Court, "to which Court such examination shall be adjourned." Does not this imply, that the Subdivision Court is to proceed with the examination, and to commit the party, if he does not answer satisfactorily?] A power to commit cannot be given by implication, any more than a power to condemn to death. Before the 1 & 2 Will. 4. c. 56., any three of the Commissioners, to whom a commission was directed, had indisputably the power to commit. Now, as all the powers they had, are by the 7th section of the new act vested in the single Commissioner, to whom a fiat is directed, each Commissioner would, therefore, except for the subsequent restriction in the 7th section, have equal power to commit. That section goes on to declare that *one* shall not commit; but it there stops short, and does not say that a Subdivision Court shall commit, or that nothing less than a Subdivision Court shall have power to commit. It would seem, therefore, that *two* Commissioners have as much authority to commit, as the Subdivision Court; for the previous part of the 7th section expressly provided, that "any one, or more, of the said six Commissioners shall have all the authority then vested in the former Commissioners; and the subsequent limitation of this authority only applies to *one*." In *Re Smith* (a), a commitment

(a) Mont. & Bli. 425.

and signature of the warrant by *two* Commissioners only, was determined to be good.

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Ex parte
LAMPON.

Mr. *Montagu*. In *re Smith*, the question was, not simply whether *two* Commissioners could commit, but whether, when a Subdivision Court was regularly constituted of three Commissioners, a commitment was good, although two only concurred in it and signed the warrant. Here only two Commissioners were present, when the bankrupt was brought up for examination.

LORD BROUGHAM, C.—There is nothing in *Smith's* case which applies to this; nor can I find any thing in the act giving two Commissioners only the power to commit. It might have been advisable, perhaps, to have added at the end of the 7th section, that after the adjournment of the bankrupt's examination to the Subdivision Court, "the case should be proceeded with, and the prisoner dealt with by such Court," or words to that effect; but I cannot conceive that they are by any means necessary; and it would be superfluous to add words to render clear that which is clear enough without them. No one can doubt that the fair construction of the 7th section is, that one Commissioner can only commit to the provisional custody of the messenger; and that after the examination is transferred to the Subdivision Court, that Court is the proper tribunal to exercise the power of committal. The 6th section declares that the object of forming a Subdivision Court is for hearing and determining the matters and things and making the examinations hereinafter referred thereto." Looking, therefore, at the two sections together, the intent is clear that the Sub-

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division Court is to proceed with the examination of the bankrupt, and to commit him, if he does not answer to their satisfaction. In the present case, however, the commitment was by two Commissioners, although the act declares expressly that a Subdivision Court shall consist of three. Now I think that any party, before he is finally committed for not answering satisfactorily, is, by the clear meaning of this act, entitled to have three judges present; not that they need be unanimous in the sentence of committal,—but inasmuch, as their reasoning and arguments may have some influence upon each other, before they pronounce their final judgment. The mere presence, indeed, of all three may produce some good effect; for persons will often, when alone, do that which they would not do in the presence of others. In this case, had Mr. *Holroyd* been present when the Subdivision Court was held, it might have happened, that something would have been suggested by him to induce the two other learned Commissioners to have arrived at a different conclusion.

The prisoner ought, therefore, to be discharged forthwith.

Mr. *Swanston* and Mr. *Montagu* then pressed for costs, as in *Ex parte Bardwell*; but

Lord BROUGHAM said there were peculiarities in that case, which induced him to give the costs; but that those circumstances did not exist in the present case; and he therefore refused to allow the costs.

After the bankrupt was discharged, he was arrested for debt on his way home, whilst proceeding down

Westminster Hall. The officer was warned that he was committing a contempt, and that an application would be made against him to the Lord Chancellor; notwithstanding which he proceeded in the arrest.

1834.

Ex parte
LAMPON.

Mr. *Montagu* having mentioned this circumstance to the Lord Chancellor, his lordship ordered that the bankrupt should be immediately discharged, saying, "It is a very gross contempt; and if the party be again molested on his way home, I will commit every person concerned in the act." (a)

(a) And see *Ex parte Clarke*, 2 Dea. & Ch. 99; *Ex parte Jeyes*, post, 764.



Ex parte SMITH.—In the matter of JOHN JAMES.

Westminster,
May 22.

MR. *E. CHITTY* applied, by motion, that the time for opening a fiat directed to country Commissioners under the 1 & 2 Will. 4. c. 56. s. 14. might be enlarged, on the ground that one of the Commissioners was absent in London, and two others were creditors of the bankrupt, and that the time for opening the fiat would expire on the following day, the 23rd May.

A fiat, omitted to be opened within the time limited by the general order, is not for that cause absolutely superseded, but only supersedable.

What is required to be stated in an affidavit on an application to enlarge the time for opening a fiat.

The COURT made the order; but suggested that a country fiat was not necessarily annulled, because it was not opened within twenty-eight days (a). Although it was supersedable for that cause, it was not absolutely superseded; and it is only supersedable, in the

(a) See Gen. Ord. 26th January 1793.

1834.

Ex parte
SMITH.

event of another creditor taking out a second fiat(a). If that is not done, the fiat may be opened at any period of time; but the Court has always been very jealous of this abuse of the great seal; and where a commission has not been prosecuted for a length of time, the Lord Chancellor has superseded it, even though in operation at the time of the application, without any order of this Court for that purpose. But though an order to enlarge the time is made, it will not deprive another creditor of the right to apply for a supersedeas for non-prosecution of the fiat; such an order being made, however, may certainly afford a *prima facie* ground for refusing the application.

The present Order must be, of course, at the costs of the petitioning creditor, subject to any future application by him upon the subject; for it must not be forgotten, that if a party is put to expense by any fault of the Commissioners, this Court has undoubtedly the power to make them answerable for the payment of it.

Sir G. ROSE expressed a hope that, on these *ex parte* applications for time to enlarge the time for opening a fiat, the Court would in future require an affidavit from the party applying, of a *bonâ fide* intent to prosecute the fiat, that there is no collusion with the bankrupt, and that no composition deed was in contemplation by the bankrupt with his creditors.

The rest of the COURT thought that it would be proper in future to adopt that practice.

(a) See *Ex parte Baker*, 2 Dea. & Ch. 362.

1884.

Ex parte LOVEGROVE.—In the matter of COOPER.

THIS was the petition of an assignee to have his travelling expenses allowed, which had been incurred by him in the execution of the duties of his office since he had been chosen assignee, and which the Commissioner thought he could not allow, on the authority of *Ex parte Elsee*(a).

**Ex parte
SMITH.
Westminster.
May 26.**

An assignee is entitled to his travelling expenses incurred by him subsequent to the choice of assignees.

The COURT thought that an assignee was entitled to be allowed all his expenses necessarily incurred by him in the progress of the commission, whether occasioned by travelling, or otherwise; and they distinguished this case from *Ex parte Elsee*, inasmuch as the travelling expenses in that case were incurred by the assignees before they were chosen assignees; but in this case they were incurred subsequently (b).

(a) 1 Mont. 1.

(b) That fact does not appear in *Ex parte Elsee*, though it does in *Ex parte Bray*, 1 Rose, 144, there cited, where the allowance claimed was not for the travelling expenses of an assignee, *quâ assignee*, but to defray the expenses of the party before he was chosen assignee, occasioned by a journey to the place of election to choose assignees. In *Ex parte Strange*, Mont. & M. 31, Lord Lyndhurst, under the authority of 6 Geo. 4, c. 16. s. 106., directed that assignees should be allowed extra costs incurred by them in prosecutions for conspiracy and perjury. And generally speaking, a trustee, though not entitled to compensation for personal trouble and loss of time, is nevertheless entitled to all reasonable expenses which he may have incurred in the conduct of the trust. *Brocksope v. Barnes*, 5 Madd. 90; and see *Marshall v. Holloway*, 2 Swanst. 453.

1834.

Westminster,
May 28,
coram
Lord
Chancellor.

A bankrupt is
protected from
arrest, on an
attachment for
contempt for
non-payment of
money, on his
return home
from passing his
last examina-
tion.

Ex parte JEYES.

IN this case a fiat was issued against the bankrupt in March, and whilst he was proceeding to attend the Commissioners at Northampton, for the purpose of passing his last examination, he was arrested by a sheriff's officer on the 9th May instant, upon an attachment issued against him for not paying a sum of money to one *Mary Lloyd*, pursuant to an order of the Court of Chancery, which attachment was obtained by *Mary Lloyd* on the 22d March. The bankrupt told the officer, that he was protected from arrest for a certain period under his bankruptcy, and showed him the indorsement of the Commissioners for that purpose on his summons; upon which, the officer permitted him to attend the Commissioners, but took him again into custody immediately after he had finished his examination.

Mr. *Bethell* now applied for the discharge of the bankrupt, and that *Mary Lloyd*, who had issued the attachment, might pay the costs.

Mr. *Knight*, contra. The bankrupt in this case had been the plaintiff in a suit against *Mary Lloyd*, and he was ordered to pay this sum of money for his improper conduct in that suit. This was therefore a matter *in pœnam*, and the sum so ordered to be paid could not be proved under the commission(a). All that has been done here against the bankrupt, as to the time and manner of the arrest, has been by the act of the sheriff, and not by the act of the party who issued the attachment; and yet the costs here are asked against *Mary Lloyd*.

(a) *Quære tamen.*

Lord BROUGHAM, C.—An attachment for contempt for non-payment of money, though sounding as a criminal procedure, has always been looked upon by the Courts as in the nature of civil process; and the invariable rule is, that whoever is attending a Court of Justice, either as a party, or as a witness brought there not by his own voluntary act, but by a subpoena, or other legal mandate requiring his attendance, is protected at common law, *eundo, morando, et redeundo*. The bankrupt must be therefore immediately discharged. I shall reserve the question of costs.

1834.

Ex parte
JONES.

Ex parte LEWIS LOYD and others.—In the matter of
JAMES OGDEN and CHARLES WALMSLEY.

Westminster,
May 29.

THIS was the petition of equitable mortgagees of certain freehold and leasehold premises, praying for the usual order of sale of the property, as well as of a steam-engine and of certain machinery, and other fixtures attached to it.

A., who was a partner with B., deposited with their bankers the deeds of a freehold cotton mill belonging to A., as a security for advances made by the bankers for the use of the firm of A. and B.; and in the memorandum of deposit it was stated, that the buildings were insured for 2000*l.* and “the machinery, &c. for 2000*l.* more;” a steam-engine and other ma-

The petitioners were bankers at Manchester, carrying on business under the firm of *Jones, Loyd, & Co.*, and the bankrupts were cotton spinners at Hollinwood, near Oldham, and kept a banking account with the petitioners for several years previous to their bankruptcy. On the 1st June 1822, there being then due to the petitioners 872*l.* 14*s.* 4*d.*, *Ogden*, on behalf of

machinery having been previous to the deposit erected by A. and B. for the purposes of their trade. A. and B. continued in possession of the premises, with all the machinery, up to the period of their bankruptcy. Held, *first*, that the bankers had a lien on the steam-engine and machinery, as well as on the building. *Secondly*, that the steam-engine and machinery, though removable by a tenant as fixtures erected by him for the purposes of trade, yet being firmly attached to the walls and floors of the buildings, and being such fixtures as are frequently put up by the owners of cotton mills, and let with the mills to a tenant, were not to be considered as in the reputed ownership of the bankrupts, within the meaning of the 6 Geo. 4. c. 16. s. 72.

1834.
—
Ex parte
LOYD
and others.

himself and *Walmsley*, deposited with the petitioners the title-deeds of certain leasehold premises, accompanied with a written memorandum in his own handwriting, stating that “the deeds were placed in the hands of *Jones, Loyd, & Co.*, as security for what they might think proper to advance to *Ogden* and *Walmsley*.” And on the 3d August 1822, *Walmsley*, on behalf of himself and *Ogden*, deposited with the petitioners the title-deeds of a freehold cotton mill, or factory, the property of *Walmsley*, by way of further security for such sums as might be advanced to them by the petitioners; at the same time giving the petitioners a memorandum written and signed by himself, which was as follows:—

“These deeds of the Canal Mill at Hollinwood, are placed in the hands of Messrs. *Jones, Loyd, & Co.*, as security for what sum they may think proper to advance to *Ogden* and *Walmsley*, by *Charles Walmsley*. The buildings alone are insured for upwards of 2000*l.*—*machinery, &c.* 2000*l.* more.”

On the 16th November 1833 a fiat was issued against *Ogden* and *Walmsley*, when there was a balance of 2777*l.* due from them to the petitioners on the banking account; and the petitioners claimed to be entitled to a lien upon all the premises comprised in the title-deeds, to the amount of the balance so due.

The petitioners prayed, that they might be declared equitable mortgagees of the leasehold premises, and of the freehold cotton mill or factory, together with the *steam-engine, boilers, steam pipes, main shafting, and principal mill gearing and fixtures*, in the mill and buildings, to the extent of the said sum of 2777*l.*, with interest thereon since the date of the fiat; and that

all the said premises might be sold; and for the usual directions in the case of an equitable mortgagee.

The question was, whether the petitioners could claim any lien on the steam-engine and other fixtures, as included in the equitable mortgage.

It appeared, from the affidavits filed in support of the petition, that the bankrupts had let different compartments of the mill to different persons, whose business required machinery to be worked by a steam-engine: but these persons usually furnished their own machines. The steam-engine communicated with the different parts of the building, by means of long shafts, some of which were at right angles to others, and the lengths of which were composed of different pieces not otherwise connected than by cog-wheels; and all the machines in the building were worked by the bankrupts' steam-engine.

The evidence was contradictory, as to whether the landlord, or the tenant, of a cotton mill in that neighbourhood was generally owner of the steam-engine that worked it; and there was equal contradiction, as to whether the steam-engine attached to this mill could be removed without injury to the freehold. It was sworn, however, by an experienced appraiser, who had been a valuer of machinery in cotton mills for twenty years, that he had carefully examined the situation and manner in which this steam-engine was affixed to the building, and that it could very easily be removed without injury to the freehold; that it was the invariable practice in Manchester and the neighbourhood, in all cases when steam-engines and other things are erected by a tenant for the purposes of trade, for the tenant to remove them at the end of his tenancy, or for

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the landlord to buy them from the tenant; that in almost all cases the steam-engines in Manchester and the neighbourhood can be removed without material damage to the freehold; that the steam-engine at the Canal Mill (the mill in question) was put up in the following manner:—A large stone was put into each wall, which was of brick, and an aperture left in the wall over each stone; a bed was then cut into each stone, fully the depth of the entablature plate or beam, the ends or bearings of which were put into those beds, and hot lead poured in to fill the crevice or vacant parts, and to keep it firm in its resting on those stones; that the weight of the walking beam rested entirely upon this entablature and a cast-iron centre pillar, which rested on the stone foundation, put in for the engine, but not fixed to the freehold; that the engine could be very easily removed, by raising with a screw-jack the end of the entablature plate or beam out of the bed cut into the stones, and then lowering it down with common blocks, without any injury to the building, and without disturbing or injuring the stones in the least degree; that the building and stones must necessarily have been erected before the steam-engine was put up; and that it was customary in Manchester and the neighbourhood, for the owners of cotton mills to erect the mill, and for the tenant to put up the steam-engine.

The steam-engine and fixtures in dispute had, by agreement between the parties, been already sold, and removed by the purchaser from the building to which they were affixed; and the proceeds now awaited the decision of the Court.

Mr. *Swanston*, and Mr. *Mylne*, in support of the pe-

tition. The question in this case is, whether the assignees can set up the doctrine of reputed ownership, to except any part of this property from the claim of the petitioners. It appears that on the 3rd August 1822, when the deeds relating to this cotton mill were deposited, there was a sum of 872*l.* 14*s.* 4*d.* due to the petitioners from the bankrupts. In so long a period of time that elapsed before the fiat issued, which was on the 11th November 1833, there can be little doubt but that that debt was paid off. But whether that was so or not, the terms of deposit, though somewhat vague, seem to include the former debt,—at least, there is nothing in the agreement of deposit that excludes that construction. The main question, however, for the consideration of the Court is, what species of property was affected by this deposit. We say, that the memorandum included the machinery and fixtures, as well as the mill. [Sir *J. Cross*. I do not find in the terms of the memorandum of deposit, that the machinery was absolutely pledged.] It is stated in the memorandum, that the machinery was insured for 2000*l.* Now, it would be absurd for the agreement to state that fact, unless the machinery was meant to be included in the mortgage. A lien on the freehold will include, of course, the fixtures attached to the freehold. There are two questions here for consideration:—first, whether the machinery affixed to the building is not to be included in the term “*fixtures* ;” and secondly, whether there is any custom of trade to prevent machinery from being considered as fixtures. With respect to the machinery worked by the steam-engine, the petitioners claim only the engine itself, and the works attached to it, down to what is

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technically termed the first motion. They also claim the gas apparatus as a fixture. The steam-engine is fixed to the mill by brick and mortar; and it appears from the evidence, that it is the custom, in the manufacturing district, for a landlord to fit up a factory with a steam-engine and other necessary apparatus, and to let or mortgage the premises with those implements attached to them. But we contend that, independently of any custom of trade, the machinery in this case belongs to the mortgagees. In *Steward v. Lombe* (a), where A. mortgaged land with a windmill upon it, which was chiefly built of wood, and the deed contained also a bargain and sale of the mill; it was held, that it could not be taken in execution by a creditor of A., although A. remained in possession of it, and the jury at the trial had found that it was not affixed to the freehold. So, in *Winn v. Ingleby* (b), it was decided that a sheriff has no right, under a fieri facias, to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. And, that fixtures pass with the freehold, appears from the case of *Colegrave v. Dias Santos* (c); where, on the sale of a freehold house by the owner, the fixtures were held to pass with the house, although nothing was said about the fixtures at the sale, and they were not mentioned in the conveyance.

It is contended however by the assignees, that the mortgagors in this case having become bankrupt, while in the ostensible possession of the steam-engine and other things, which the petitioners allege to be fixtures, the fixtures must be considered in the order and dispo-

(a) 1 Brod. & B. 506.

(b) 5 B. & A. 625.

(c) 2 B. & C. 76.

sition of the bankrupt, within the rule or doctrine of reputed ownership. But this rule is subject to two limitations. In the first place, it does not extend to fixtures; nor, secondly, to those things which, though not fixtures, are, by virtue of any custom for the benefit of trade, exempted from its operation, and where the possession does not necessarily carry with it the reputation of ownership. These exceptions were established in the time of Lord *Hardwicke*, and have been confirmed by a series of decisions down to *Coombs v. Beaumont* (a), and *Rufford v. Bishop* (b). And it was upon this principle, that the recent case of *Hubbard v. Bagshaw* (c) was decided, which ought to govern the present. In that case, the owner of a cotton mill had mortgaged the mill, together with a steam-engine, boiler, &c., and continued in possession until his bankruptcy; the entablature plate of the steam-engine was fixed to the freehold, the same as in the present case; and it was held, that the steam-engine could not be considered as in the order and disposition of the bankrupt at the time of his bankruptcy, within the meaning of the 72d section of the Bankrupt Act, and therefore that it did not pass to the assignees.

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They were then stopped by the Court.

Mr. *Spence*, and Mr. *L. Wigram*, for the assignees. The equitable mortgage, in this case, does not extend to the steam-engine and machinery. The memorandum of deposit is expressly confined to "the deeds of the *Canal Mill*," without any mention of steam-engine or fixtures. The fact is, that the steam-engine was not in existence at the time of the conveyance of the mill to *Walmsley*, having been subsequently erected by

(a) 5 B. & Adol. 72.

(b) 5 Russ. 346.

(c) 4 Sim. 326.

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Ogden and Walmsley for the purpose of their business; so that the steam-engine must be considered a trade fixture, removable by the parties at whose joint expense it was set up. The cases cited, therefore, on the other side, do not apply to this. [Sir G. Rose. The steam-engine, no doubt, was partnership property. But is there any difficulty in saying, that one partner had authority to pledge it, in order to obtain an advance of money for the use of the partnership?] The answer to that is, that the steam-engine and machinery remained in the possession of the bankrupts as reputed owners, and therefore passed to their assignees. If the mortgagees in this case had filed a bill to have their security turned into a legal mortgage, a Court of Equity would not have decreed a conveyance of the steam-engine and machinery. But the recent case of *Trappes v. Harter* (a), the facts of which were precisely similar to this, and which was decided after much consideration, must govern the decision of this Court on the present occasion. In that case, the land and buildings, without any mention of machinery or fixtures, were conveyed to two of several partners; and the machinery and utensils were afterwards erected by the firm, for the purpose of carrying on the business of calico printers, and were firmly fixed to the freehold, though in such a manner that they might be easily removed without material injury to the buildings. It was proved, that in that part of the country similar articles, so fixed, were commonly bought, sold, and removed, without treating them as fixtures. The two partners, to whom the freehold belonged, mortgaged the premises for a term of years,

(a) 3 Tyr. 603; 2 Crompt. & Mee. 153.

“and also the steam-engine, mill-gearing, heavy gear, millwright work, fixed machinery, and other matters and things standing and being in or upon the thereby demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same, or any part thereof.” The partners remained in possession of the premises and the machinery until their bankruptcy, when their assignees sold and removed the machinery and utensils, except two steam-engines, with the first motion and main shafts attached to them, and two water-wheels which supplied power to the rest. Under these circumstances, it was held, that the machinery and utensils so removed, having been affixed to the building for the purposes of trade only, and in a district where such things were commonly removed by those who had set them up, were not to be taken as part of the freehold, but as part of the bankrupt’s personal estate, which passed to the assignees; and that the mortgage deed was only intended to pass that part of the machinery, which, from the circumstances of its erection, necessarily became part of the freehold. In that case, Lord *Lyndhurst* observes, “If several partners put up machinery on the freehold of one of them, for the purpose of carrying on their partnership trade, how does it become the property of that one partner who is owner of the freehold?”—“As between landlord and tenant, it is clear, that such machinery put up by the tenant might be removed by him. The bankrupts were the reputed owners of the machinery, and, in consequence of their being so considered, obtained extensive credit. We are of opinion, therefore, that with respect to machinery of this description, erected by the bankrupts for the

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purposes of trade, it would have passed to the executor, and not to the heir, and that it was the partnership estate of the bankrupts." His lordship added, that there was sufficient to satisfy the terms of the mortgage deed, without including the machinery in question, and that it neither passed, nor was intended to pass, by that deed; and that if it did not pass, it was to be looked upon as personal estate, separate from the property mortgaged, and therefore as belonging to the assignees. [*Erskine*, C. J. So that the grounds on which Lord *Lyndhurst* decided that case were, that the machinery in question was not included in the mortgage deed, and was not intended so to be.] [Sir *G. Rose*. The intent is certainly the first question in the case now before the Court; and as to that, is not the memorandum of deposit conclusive? In *Trappes v. Harter*, Lord *Lyndhurst* goes through all the cases, in order to arrive at the point, whether the property in question was personal or real; and he decided that, for the purposes and benefit of trade, it was chattel property. His words are, "Now these authorities lead us to the conclusion, that where utensils and machinery are erected by the owner for the purpose of trade only, in a neighbourhood where such utensils and machinery as these would commonly have been removed, and when this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." That is the doctrine, which, I think, must govern the case before the Court. The case of *Coombs v. Beaumont* (a) certainly appears to decide, that, as between mortgagor

(a) 5 B. & A. 72.

and mortgagee, the machinery would have sufficiently the character of realty to pass, if the parties so intended; but then it is open to the argument, that when bankruptcy intervenes, *that* creates a difference, and that the injury to the premises must then be considered. In this case, the amount of injury to the freehold, that would be occasioned by the removal of the machinery, is too trifling to be considered; while, in *Trappes v. Harter*, it is stated that it would cost 150*l.* to put the premises into complete tenantable repair.] The amount of the injury that would be done to the building by the removal of the machinery, we say, determines the point, whether the assignees have a right to it or not. Matters of ornament and furniture, it has long been determined, are not to be taken as part of the house or freehold, but are removable by the tenant; *Beck v. Rebow* (a). So in *Ex parte Quincy* (b) it was held, that a mortgage of a brewhouse, *with the appurtenances*, did not pass the utensils. [Sir G. Rose. There is no doubt that fixtures, or any kind of utensils, may be mortgaged like other personal property. But if the mortgagor continues in possession of them, and becomes bankrupt, the question then arises, whether the assignees, or the mortgagee, are entitled to them. Trade fixtures, I have always understood, belong to the assignees; and though that doctrine was somewhat shaken by the case of *Clark v. Crownshaw* (c), yet it has been lately established by *Trappes v. Harter* (d), where Lord *Lyndhurst* held they were removable by the assignees, if the

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(a) 1 P. Wms. 94.

(b) 1 Atk. 477.

(c) 3 B. & Adol. 804; see also, *Boydell v. M'Michael*, 1 Crompt. & M. 177.

(d) *Supra*.

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removal of them would not occasion too serious an injury to the freehold.] In *Clark v. Crownshaw* the fixtures were erected by the landlord, and sold to the tenant. [*Erskine*, C. J. The grounds of that decision are, that the fixtures did not come within the description of goods and chattels.] The real question however, as we contend, is, whether the fixtures can be removed without injury to the inheritance; for if so, we say, they belong to the assignees. This doctrine was expressly recognised by one of the learned judges of this Court in *Ex parte Austin* (a).

It has been contended by the other side, that where there is a custom in the trade to let machinery, this prevents any claim to it being set up by the assignees, on the ground of reputed ownership; but the case of *Lingard v. Messiter* (b) is an answer to that argument. In that case, the bankrupt, who carried on the business of a clothier, was possessed of certain machinery used for that purpose. The machinery was seized under an execution, and the sheriff and the bankrupt assigned it to the execution creditor. The creditor then demised it to the bankrupt at the rent of 10*l.* per month, and the bankrupt continued in possession of it at the period of his bankruptcy; and it was held, notwithstanding it appeared in evidence that there was a well-known usage to let machinery to clothiers, that as the bankrupt had once been the real owner of the machinery, and continued in possession of it up to the time of his bankruptcy, this was evidence of reputed ownership, and that the machinery passed to the assignees. What Mr. Justice *Bayley* said in that case, is very important in considering the present. “ When

(a) 1 Deac. & Ch. 207.

(b) 1 B. & C. 308.

once it is proved," he says, "that the bankrupt has been the owner, and has continued in possession until the time of the act of bankruptcy, the presumption is, that he then continued in possession in the character of owner; and therefore a proof of those facts is, *prima facie*, evidence that the bankrupt is both reputed and real owner. In this case it was proved, that the bankrupt was once the owner of the machinery, and the jury have found that it continued in his possession to the time of the act of bankruptcy; that being so, the reputed ownership must be presumed to have continued so long as the possession continued." That case, it is submitted, is decisive of the present question; for as to any custom to let machinery of this description, although such custom may be applicable to cases of trusts, it does not apply to cases where a bankrupt has once been the true owner.

There is another point, however, that suggests itself, in the construction of the memorandum of deposit in this case. By the terms of that agreement, the deeds are stated to be placed in the hands of Messrs. *Jones, Loyd, & Co.*, as security for what sum *they may think proper to advance*. We contend, therefore, that the deposit of the deeds was only intended to be a security for *prospective advances*, and not to relate to the sum of 872*l.* 14*s.* 4*d.*, antecedently owing from the bankrupts to the petitioners.

The COURT said that the case might stand over till the following Thursday, to afford an opportunity of reading through the affidavits, in order to consider the evidence as to the nature of the damage occasioned to the buildings by the removal of the machinery.

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The case, accordingly, came on again this day, when Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—This was a petition by an equitable mortgagee in the usual form, praying for the sale of the land, and mill, and buildings erected thereon, as mentioned in certain title-deeds deposited with the petitioners, by way of security for monies to be advanced by them, and also of the steam-engine, gas works, and certain parts of the machinery and fixtures thereon. The assignees raised no objection to so much of the petitioners' claim, as was confined to the land and buildings; but they claimed a right to remove the steam engine, gas works, and all the machinery, as the goods and chattels of the bankrupts, either as not included in the mortgage to the petitioners, or, at all events, as left in their possession as the reputed owners, and therefore as passing to the assignees under the 72d section of stat. 6 Geo. 4. c. 16. Pending the petition in this court, the matters in dispute were by mutual consent removed and sold; and the question submitted to us is, to whom the proceeds of that sale ought to be paid. For the petitioners it has been argued, that the steam-engine and other things in dispute were affixed to, and formed part of the freehold, and therefore necessarily formed part of the estate mortgaged to them, and could not be the goods and chattels of the bankrupts, either as the true or reputed owners. And if in law they must be considered between these parties as part of the freehold, both the questions raised by the assignees must, as it seems to me, be answered in favour of the petitioners. But though I am of opinion that the petitioners are entitled to the proceeds of the mat-

ters in dispute, it is not upon this short ground; for it seems to me that, though annexed in fact to the building and land, they still retained in law their character of personal chattels; and therefore it will be necessary to consider the two questions separately. In looking through the cases on this subject, a distinction seems to have been made between things that are annexed to the soil by the owner of the freehold, and those that are annexed by a tenant during his term. And the distinction is this:—that where the annexation is made by the owner of the freehold, the fixtures become, without reference to the nature of the fixtures or the purpose for which they were annexed, a part of the freehold itself, and as such descend to the heir, pass by conveyance of the land, without being specified, and cannot be taken in execution as the chattels of the owner. But where any fixture is annexed by the tenant, it does not necessarily become a part of the freehold; but its character as realty or personalty depends upon the nature of the fixture, and the purpose for which it was annexed; for which see *21 Hen. 7. c. 36*; *Steward v. Lombe* (a); *Wynne v. Ingleby* (b); *Place v. Fagg* (c), and *Trappes v. Harter* (d).

In this case, *Walmsley* was the owner of the freehold; but having entered into partnership with the other bankrupt, *Ogden*, the premises were occupied by the partners, who erected the steam-engine and other things in dispute, for the purposes of their joint trade. The firm, therefore, may be taken as occupying the premises as mere tenants; and the circumstance, of one

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(a) 1 Bro. & B. 506.

(b) 5 B. & A. 625.

(c) 4 Man. & Ry. 227.

(d) 3 Tyr. 603.

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of the firm being also owner of the soil, will make no difference; for that was the case in *Trappes v. Harter* (a); and in p. 617 of that report, Mr. Baron *Bayley* asks, was the machinery originally erected at the joint expense of the concern, and if it was, was it the property of *Henry Fielding* only, or of *Henry Fielding* and the other partners? And, upon the counsel arguing that, though put up at the joint expense, it nevertheless became the property of *Henry Fielding*, Lord *Lyndhurst* says, "If several partners put up machinery on the freehold of one of them, for the purpose of carrying on the partnership trade, how does it become the property of that one partner who is owner of the freehold?" And, in the decision of that case, the firm was considered as erecting the machinery in dispute as mere tenants.

Looking at the machinery now in question, as fixtures erected by the bankrupts as tenants, for the purposes of trade, the first question would be, were the fixtures such as they were entitled to remove during the term? That they were, is plain, from a long train of authorities, the substance of which is summed up by the Vice-Chancellor, in the case of *Hubbard v. Bagshaw* (b), in which he says, "The general rule is, that whatever is affixed to the freehold, whether by the tenant or not, shall remain, and not be removed by the tenant, but be part of the freehold. One exception to the rule is the case, where the tenant, for the purposes of trade, at his own expense, erects buildings, or affixes machinery. In that case he may remove them during the term, or during his possession after the term." And though the

(a) *Vide supra*.

(b) 4 Sim. 338.

machinery in question is more intimately connected with the building, than the other parts of the machinery, to which no claim is set up by the petitioners, yet it does not appear to me to have been so permanently incorporated with the building, as to make it irremovable by the tenant, on the ground of destructive waste. The principle, upon which the tenant's right to remove things annexed by him to the freehold for the purposes of trade depends, has been differently viewed by high and learned authorities, as may be seen by contrasting the observations of *Gibbs*, C. J., in *Lee v. Prisdon* (a), and Mr. *Amos*'s remarks in his able *Treatise on Fixtures*, with the cases which I shall have occasion to mention presently; but the right of the tenant's executor to such fixtures at his death, and the right of the sheriff to take them in execution under a *fi. fa.* against the tenant's goods and chattels, seems to me to confirm the principle adopted in *Trappes v. Harter*, that in all questions between the landlord and tenant, they retain during the term their character of personality, and do not become a parcel of the realty, until the tenant shall have left them annexed at the end of the term; when, according to Lord *Holt*'s language in *Poole's case* (b), "they become a gift in law to him in reversion, and are not removable;" that is, as I understand it, they remain the personal chattels of the tenant during the term,—and then, if left, they become the property of the owner of the freehold, and by the unity of title they lose their character of personality, and become in law, as well as in fact, and for all purposes, a part of the freehold. And it may be observed, that

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(a) 7 Taunt. 191.

(b) Salk. 368.

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in the case of *Lee v. Prisdon* (a), the fixtures in question had been annexed by the landlord, and though by him sold to the tenant, had never been severed from the freehold, of which, at the time of the sale, they unquestionably formed a part, both in law and in fact. The decision therefore of that case does not interfere with the view that I take of this question ; which, however, I should not venture to maintain against the dictum of so eminent a lawyer as C. J. Gibbs, if I did not find the principle recognized in several decided cases. It is the principle, upon which the Court of Exchequer decided the case of *Trappes v. Harter*, and may be traced in the cases in the Year Books, 20 Hen. 7.—13. 21 Hen. 7.—26., and in *Wynne v. Ingleby* (b), and *Place v. Fagg* (b), and is expressly referred to by Lord Kenyon in *Penton v. Roberts* (c). Lord Kenyon says, “ The old cases upon this subject leant to consider, as realty, whatever was annexed to the freehold by the occupier ; but in modern times, the leaning has always been the other way, in favour of the tenants, in support of the interests of trade, which has become the pillar of the state.” And, further on, his lordship adds, “ This is a description of property divided from the realty.” And this is still more explicitly stated by Lord Ellenborough in *Elwes v. Maw* (d) : “ In the three principal cases on the subject (which he particularizes) the Court may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil, was an accessory to a matter of a personal nature, that it should itself be considered as personalty.”

(a) *Suprà.*

(b) *Suprà.*

(c) 2 East, 90.

(d) 3 East, 53.

And he then proceeds to show how, in the cases referred to, the matters in dispute were accessory to a matter of a personal nature, and that the exceptions were confined to cases connected with trade. The same may be inferred, also, from the reasons given by C. J. Dallas in *Buckland v. Butterfield* (a), who concludes the judgment of the Court by saying, "We agree with the learned judge, in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste." Now there was no question in that case, that the conservatory which had been removed was, in fact, attached to the soil; but the question was, whether, in law, it was removable by the tenant; and the language used implies that the Court thought, that if it had been removable, it would not have been at law considered annexed to the freehold. The same principle seems recognized by Bayley, J. in *Place v. Fagg* (b), in which that learned judge says, "Fixtures, which the tenant has a right to remove, may be treated as chattels in a proceeding against the tenant; but, as against the owner of the estate, they are part of the freehold." And, in *Trappes v. Harter* (c), the same learned judge says, "There is another point, viz., that the legal interest in these articles is not in the persons, who, having the legal estate in the premises to which they were affixed, mortgage these premises." And Lord Lyndhurst, in giving the judgment of the Court (d), after citing at length the earlier cases on the subject, says, "Now the authorities lead us to the conclusion, that where utensils and machinery are erected by the owner for the purposes of trade only, in a neighbourhood

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(a) 2 Brod. & B. 54. (b) *Supra*. (c) 3 Tyr. 622. (d) *Ibid*. 628.
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where such utensils and machinery as these would commonly have been removed, and when this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." And if the distinction, to which I have already alluded,—between the cases where the fixtures have become the property of the owner of the freehold,—and the cases where they remain the property of the tenant, who has annexed them to the soil,—be kept in mind, all the cases cited on the other side, of *Horne v. Baker* (a), *Clarke v. Crownshaw* (b), and *Coombes v. Beaumont* (c), may be reconciled with the decisions of *Trappes v. Harter*, and with the view that I am now taking of the case before this Court. For in all those cases the fixtures had become the property of the owner of the freehold, and had therefore lost their character of personalty, and had become in law a part of the freehold itself. In *Horn v. Baker*, though the fixtures were originally put up by the tenant, yet the lease of the premises to which they had been annexed had expired in 1804, and had been renewed in 1805. The fixtures, therefore, forming a part of the premises let by the renewed demise, would have been no longer removable; but would, for every purpose, form a part of the freehold, according to the case of *Thresher v. East London Waterworks* (d), and *Naylor v. Collinge* (e). In all the other cases, the fixtures in question had been annexed before the demise to the tenant, and had therefore unquestionably become for every purpose a part of the freehold. The observation therefore of Mr. Justice *Littledale*, in *Coombs v.*

(a) 9 East, 215.

(b) 8 B. & Adol. 884.

(c) 5 B. & Adol. 72.

(d) 4 B. & C. 608.

(e) 1 Taunt. 19.

Beaumont, that the steam-engine was part of the freehold, and did not come under the description of goods and chattels, is not at all at variance with the view taken by the Court of Exchequer in *Trappes v. Harter*. And the observation of Mr. Justice *Parke*, that he never knew that any distinction was made between such fixtures as would be removable between landlord and tenant, and such as would not, does not seem to refer to the general character of fixtures put up by the tenant as personalty, or part of the realty, but to the question whether they would ever in that case come within the class of goods and chattels contemplated by the legislature in the 72d section of stat. 6 Geo. 4. c. 16. This question I shall have to consider presently; but it must first be ascertained, whether the things in dispute passed by the contract of mortgage to the petitioners.

The deposit of the deed was by *Walmesley* only, the owner of the freehold. If the machinery in question formed no part of the freehold, the deposit of the deed would not of itself necessarily convey any interest in the fixtures which belonged to the firm. But, looking to the whole transaction,—finding that the premises were in the occupation of the firm,—that the advances were to be made for the benefit of the firm,—that the mere building would probably be a very inadequate security of itself,—it is difficult to believe, that it was the intention of the parties to confine the security to the mere land and buildings. And when we refer to the written memorandum, and find the machinery, and the amount at which it was insured specified, it is impossible to doubt that the machinery formed part of the security, upon which the petitioners were to make

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their advances; and I think we may fairly take *Walmsley*, as mortgaging for himself his own freehold interest in the land and buildings,—and, as agent for the firm, mortgaging the leasehold interest, and the property of the firm in the machinery. The question then before the Court is reduced to this—are these fixtures goods and chattels within the meaning of the 72d section of the Bankrupt Act? This question the decision of *Trappes v. Harter* (a) leaves wholly untouched; because, the Court there having decided that the machinery in question was not included in the mortgage, it passed to the assignees, as part of the property of which the bankrupt was the true, as well as the apparent, owner. In the case of *Coombs v. Beaumont* (b), Mr. Justice *Littledale*, after observing that the steam-engine in that case was part of the freehold, and did not come under the description of goods and chattels, says: “Independently of that, property affixed to the freehold is not within the intent of the statute; because the possession of such property does not create a visible ownership in the bankrupt, so as to procure him credit.” And Mr. Justice *Parke* adds: “The steam-engine, if affixed to the freehold, clearly does not pass to the assignees; because it does not come within the description of goods and chattels in the 6 Geo. 4. c. 16. s. 72. This was determined in *Horn v. Baker* (c); and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removable between landlord and tenant, and such as would not.” And in *Steward v. Lombe* (d), Mr. Justice *Richardson*

(a) *Suprà.*(b) *Suprà.*(c) *Suprà.*

(d) 1 Brod. & Bingh. 506.

says: " Though in the estimation of the jury this was considered as a chattel, yet it is *quodammodo* annexed to the land, and very distinguishable from that species of goods and chattels, of which the property usually accompanies the possession; and no false credit is promoted by the occupier not being actually the owner."

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Adopting therefore the principle laid down in *Trappes v. Harter* (a), and viewing the things in dispute in the character of personalty, rather than as part of the realty, I nevertheless concur in the opinions that I have last cited, that they do not fall within the description of goods and chattels included in the 72d section of the Bankrupt Act. It is not necessary in this case to decide, whether any and what description of tenants' fixtures may be considered within the range of that section. It is enough to say, that the facts disclosed in the affidavits clearly exclude these from its operation. For the things in dispute appear to have been firmly attached to the floor and walls of the building, and only capable of being detached by severing parts of the building itself, though without doing any material damage; and were, besides, such things as are frequently, though not invariably, put up by the landlord and let with buildings of this description, and to all appearance formed part of the building itself. They are very distinguishable from that species of property, which seems to have been within the contemplation of the legislature, when it passed the enactments in question; and I am therefore of opinion, that the petitioners are entitled to the relief they seek.

Sir J. CROSS.—I have had no doubt whatever on the

(a) *Suprà*.

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present question, since the case was first opened by the counsel for the petitioners. I have been always of opinion, that a man might safely take a mortgage of a tenant's fixtures, without being subject to the claim of the assignees of the tenant, on the ground of reputed ownership. This appears to have been the law from *Ryall v. Rolls* (a), decided nearly a hundred years ago, to the case of *Horn v. Baker* (b), which occurred about twenty years since; where it was held that the stills erected in a distillery belonged to the landlord, and only the moveable vats to the assignees. That case appears to me to be a stronger one than this; for stills are only applicable to the business of a distiller, while here, the steam-engine, and power attached to it, would be applicable to any trade. The only doubt, that could possibly be suggested to the claim of the petitioners in this case, arises from the recent decision in the Exchequer of *Trappes v. Harter*; but the point decided there seems to have been rather misunderstood. It was not, as has been stated by the respondent's counsel, that the utensils in that case could not be made the subject of a mortgage; but the ground of the decision was, that the utensils were not included in the mortgage deed; for, if they had been so included, a very different result would have followed. But what are the facts of the case now before the Court? Here, there is no mortgage deed, but the petitioners are equitable mortgagees by virtue of a deposit of the title-deeds made by one of the partners, who was separately entitled to the building, the steam-engine and machinery having been previously erected by both partners, and being then upon the premises. If nothing had been said about machinery

(a) 1 Atk. 165; 1 Ves. 348.

(b) 9 East, 215.

in the memorandum of deposit, there might perhaps have been a doubt whether it was to be considered so attached to the freehold, as to pass with the freehold to the mortgagee. But the terms of the memorandum relieve us from all doubt on the subject; for it is there stated, that the buildings are insured for 2000*l.*, and "*the machinery &c. for 2000*l.* more;*" thereby plainly intimating to the bankers, that they were to have the security of both buildings and machinery; and the bankers, upon the faith of this security, advanced more than the sum at which the buildings were valued; which clearly shows the mode in which they interpreted the security. The essential distinction, therefore, between this case and that of *Trappes v. Harter* is, that here the property was mortgaged,—there, it was not. The case of *Horn v. Baker* (a), too, was one between landlord and tenant; this is a case between mortgagor and mortgagee; but there is no distinction as to the law in both these cases; it is just the same, whether the parties are landlord and tenant, or mortgagor and mortgagee. A person who erects a steam-engine, and then mortgages it, but continues in possession, is really nothing more than a tenant to the mortgagee. A good deal of evidence has been laid before the Court, as to the existence of a custom for persons in possession of cotton mills to hire machinery; but this has not altered the view I have taken, as to the rights of these parties. It rather serves to prove, that manufacturers are not considered as the owners of machinery, merely because they are in possession of it. In *Rex v. Mellor* (b), which was a settlement case, the owner of a cotton mill worked by a steam-engine, let to a tenant a standing

1894.

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Ex parte
Lord
and others.

(a) 9 East, 215.

(b) 2 East, 189.

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place in a room for a carding machine of the tenant's, which was worked by the machinery of the engine, and fastened to the floor and the roof of the room. The man paid a rent for the power, but the machinery that gave the power was the property of the landlord; and the Court of King's Bench determined that this was not a letting of any part of the mill itself, and that no settlement could be gained under it. I think, therefore, that the steam-engine and machinery in this case must, as between landlord and tenant, be taken to be *prima facie* the property of the landlord, and that there is no ground for saying that the bankrupts were reputed owners of it.

Sir G. ROSE.—The general rule of law has always been, that whatever was attached in any way to the freehold became in all respects an incident of the freehold,—until some exceptions were afterwards recognised by the Courts, for the protection and benefit of trade. When bankruptcy intervenes, then the question arises, to what fixtures of the bankrupt tenant the assignees are entitled? And, in considering this question, the point to be determined is, whether the fixtures are removable as between landlord and tenant, or between heir and executor; for on this point depends the question of reputed ownership. In *Trappes v. Harter* (a) the test was, whether the fixtures could be removed without injury to the freehold; and Lord *Lyndhurst* conveys in very clear language the distinction between such fixtures as are removable as between landlord and tenant, and such as are not. I cannot do better than adopt his lordship's own words: "Where such utensils and

(a) *Suprà*.

machinery as these would commonly have been removed, and when this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." It became, therefore, only necessary to look through the evidence in this case, to determine the question, whether these things could be removed by the assignees, without injury to the inheritance. After a careful perusal of the affidavits, I think they could not be removed without causing such injury to the freehold, as would sustain an action for damages; and I also think, that a Court of Equity would have granted an injunction, as in the nature of waste, to prevent such removal.

The last and material question to be considered is, whether the machinery in question was included in this equitable mortgage. Now, I am disposed to think, that machinery of this description would be comprehended in the general words of the title-deed itself, which conveyed the property to *Walmsley*. But if there was any doubt on that point, still, when I find, from the evidence in this case, that these parties were in partnership,—that the money, for which the security was given, was advanced for the purposes of the partnership,—and that the *machinery* is expressly included in the terms of the memorandum of deposit,—I can come to no other conclusion, than that the intent was to mortgage the machinery, together with the cotton mill, and that *Walmsley* had full authority to do so for the benefit of the partnership.

Ordered as prayed.

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Ex parte
Loyd
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Westminster,
June 6.Ex parte JAMES SIMPSON and others.—In the matter
of HENRY SUDELL.

H. S., who employs E. & Co. as his brokers, and L. & Co. as his general agents, gives E. & Co. the following undertaking:—"In consideration of your allowing L. & Co. to draw upon you to the extent of 12,000*l.*, and your accepting three drafts accordingly, I hereby guarantee to you that amount; it being distinctly understood, that payment of these drafts is to be provided either by myself, or L. & Co., in direct discountable bills." E. & Co. accordingly accept and pay these drafts, in consideration of which they receive from H. S. and L. & Co. various substituted bills. H. S. and L. & Co. respectively become bankrupt, when the substituted bills are still running, and which are not paid when they fall due: Held, that L. & Co. were entitled to prove under the commission against H. S. the balance that was due to them in respect of their advances on the faith of this undertaking, which was not so much a guarantee, as an original undertaking of H. S. as a principal.

And, *semble*, it would have been provable, even though the instrument was considered as a guarantee.

THE original petition in this case was heard on the 15th January 1833^(a); when an Order was made that Messrs. Myers and Co., the petitioners in that petition, should prove for the sums of 7845*l.* and 6161*l.* against the estate of the bankrupt, and be paid dividends on the amount of such proofs, but not disturbing any dividends then already declared. The present petition was presented by the assignees for a re-hearing, and stated the facts set forth in the former petition, which, being somewhat imperfectly given in the first report of this case, will be now more accurately stated.

The petitioners in the former petition had, prior to, and since October 1823, carried on in copartnership the business of brokers at Liverpool, under the firm of *Ewart Myers & Co.*, and in London under the firm of *Ewart, Taylor, & Co.*; and since October 1823, they had extensive dealings with the bankrupt, *Henry Sudell*; which dealings consisted partly of money lent and advanced by *Ewart & Co.* for the use, and on the account of the bankrupt, on the balance whereof a sum of 7845*l.* was due from him to *Ewart and Co.*,—and partly of monies lent and advanced by *Ewart & Co.* under the following written undertaking of the bankrupt, given by him on the 8th November 1823.

(a) See *Ex parte Myers*, ante, vol. ii. 251.

" Messrs. *Ewart Myers & Co.*

1884.

" Gentlemen,

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Simpson
and others.

" In consideration of your allowing Messrs. *William Lyne* and *Thomas Sudell* to draw upon you to the extent of 12,000*l.*, and your accepting three drafts accordingly, but so as for them not to have more than that sum running upon you at one period; I hereby guarantee to you that amount, it being distinctly understood that payment of these drafts is to be provided for *either by myself*, or Messrs. *William Lyne* and *Thomas Sudell*, in direct discountable bills, fourteen days at the least before they fall due; and I also guarantee the due payment of all remittances made to you by Messrs. *William Lyne* and *Thomas Sudell*. I cannot conclude this letter, without expressing my thanks for your confidence; and with the hope that the arrangement will be mutually advantageous,

" I remain, Gentlemen, very respectfully,

" Your obedient servant,

" *Henry Sudell.*"

Lyne and *Sudell*, who were merchants and partners at Liverpool, were employed by *Henry Sudell* as his general agents there; and they accordingly, from time to time, drew bills of exchange on *Ewart Myers & Co.* at three months date, all of which bills they accepted and paid on the faith of the guarantee; and in consequence of *Lyne* and *Sudell* failing to reimburse *Ewart & Co.* the amount of such payments, a balance of 6161*l.* became due to them from *Henry Sudell* on the guarantee account.

On the 7th August, 1827, a commission of bankrupt

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Ex parte
Simpson
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was issued against *Henry Sudell*; and in September following *Lyne* and *Sudell* also became bankrupts.

On the 15th July 1831, *Ewart* and Co. applied to prove under the commission against *Henry Sudell*, for the two sums of 7845*l.* and 6161*l.*; but, the Commissioners having rejected the proof, they presented the former petition to be allowed to prove these sums; and, upon the hearing of that petition, the Order was made in the terms above stated.

The present petition for re-hearing then proceeded to state, that *Myers & Co.* on the 10th June 1833 accordingly proved for the sums of 7845*l.* and 6161*l.*, and that dividends to the amount of 1079*l.* had been subsequently paid on such proofs. That since the hearing of the original petition the assignees had discovered further evidence with respect to the said sum of 7845*l.*, namely, that the original petitioners, Messrs. *Myers & Co.*, not only made no report, and rendered no account to the bankrupt, or to the present petitioners, as the assignees, of the sales of certain cotton sold by *Myers & Co.* as brokers,—but that they from time to time rendered accounts of such sales to *Lyne* and *Sudell*, and to the assignees of *Lyne* and *Sudell*, in the following form:—

“Liverpool, Exchange Alley, 12th Nov. 1827.

“Messrs. *Wm. Lyne* and *Thos. Sudell*.

“We have this day sold for you the under-mentioned cotton to *Joseph Hodgson & Son*.

“H. S. twenty Egyptians, per Thomas, at 75*l.* 8*s.*

“Payment, ten days and three months.

“Your's respectfully,

“For *Ewart Myers & Co.*

“*B. Bradshaw.*”

The prayer of the present petition was, that the former petition might be reheard, and that the Order made thereon might be rescinded, and the former petition dismissed; that the affidavits filed in support of, and in opposition to, the original petition might be read, upon the hearing of this petition; that the proofs made by *Myers & Co.* might be expunged, and that they might be ordered to refund to the assignees the amount of the dividends received by them upon such proofs. It appeared, that some of the substituted bills, which were given by *Lyne & Sudell* and by *Henry Sudell*, to provide for the payment of *Ewart & Co.*'s acceptances, were running at the period of their respective bankruptcies, and were not paid when they fell due, leaving *Ewart & Co.* creditors of *Henry Sudell* for the amount of the two sums they sought to prove under his commission.

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Mr. *Montagu*, and Mr. *G. Richards*, appeared in support of the present petition. The first question is, whether the sum of 6161*l.* advanced by *Myers & Co.* on bills under a guarantee, was provable under this commission. It appears, that some doubts have been entertained by the Commissioners, as to the correctness of the former decision; and in the subsequent case of *Ex parte Marshall* (a) the Chief Judge thus expresses himself: "As upon referring to the reports of *Ex parte Myers*, it appears to me that I have gone further than the authorities, upon closer examination, will warrant, I wish to avail myself of the reservation of our final judgment on this petition, by pointing out more precisely the view I take of the question. In my judgment

(a) 3 Dea. & Chit. 139; 1 Mont. & A. 145.

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Ex parte
Surreen
and others.

in *Ex parte Myers*, I have not sufficiently marked the distinction between contingent liabilities that may never become debts, and contingent debts that may never become payable. Upon the fullest consideration of all the reported decisions, I am satisfied that claims under the first class, upon which no debt has arisen till after the bankruptcy, cannot be proved under the 56th section; but that all claims falling within the latter class, that are either capable of valuation before the contingency happens, or have become payable by the happening of the contingency after the bankruptcy, and before proof is tendered, may be admitted. The case of *Ex parte Thompson* (a) is an example of the first class; the case of *Ex parte Myers* (b) was decided as belonging to the second class. In the case of *Ex parte Thompson* there was no debt from any one, till after the bankruptcy; in *Ex parte Myers* a debt had been clearly contracted with the holders of the bills before the bankruptcy, for a specific sum which the bankrupt had engaged to pay, unless he should be released from his obligation by the drawers taking up the bills. Whether, in deciding that case, we sufficiently adverted to the distinction between guarantees for the repayment of monies actually advanced, or goods sold and delivered to third parties before the bankruptcy, and guarantees for payment of securities current at the time, may perhaps be a fit subject for consideration whenever a similar case may arise." As the present question is one of very considerable importance, and the former decision of it is at variance with many cases, it is of great importance that it should be re-considered, in order to settle what the law on the subject really is.

(a) 2 Dea. & Chit. 126.

(b) Id. 251.

It will be proper, in the first place, to take a view of the evil existing as to the proof of contingent debts before the passing of the 6 Geo. 4. c. 16., and which the 56th section of that statute was meant to remedy. Previous to that statute, great hardship was incurred by creditors under marriage settlements, as to their inability to make proof of their debts, where the contingency on which they became payable did not happen until after the bankruptcy of the contracting party. Thus, in *Ex parte Caswell* (a), where the bond of a husband to his wife's trustees was conditioned for payment only in the event of his wife's surviving him, and the husband became bankrupt in the lifetime of his wife, the bond was held not provable under his commission. The hardship incurred by a creditor under this state of circumstances was also commented upon by the Lord Chancellor in *Ex parte Greenaway* (b), *Ex parte Groom* (c), and *Ex parte Mitchell* (d). So in another class of debts, which were contingent only as to the time of payment, the same evil existed; as in *Ex parte Barker* (e), where a bond was given conditioned for the payment of 1000*l.* by the executors after the decease of the obligor, the bond was decided not to be provable. Another species of contingent debts not provable were guarantees, where the surety became bankrupt before any liability attached on him, and where it was uncertain whether he ever would become liable for the debt.

To provide a remedy for these evils, it is enacted by the 56th section of the 6 Geo. 4. c. 16., "that if any bankrupt shall, before the issuing of the commission,

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SIMPSON
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(a) 2 P. Wms. 497.

(b) 1 Atk. 113.

(c) Id. 115.

(d) 1 Atk. 120.

(e) 9 Ves. 110.

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have contracted any debt payable on a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the Commissioners to set a value upon such debt, and the Commissioners are hereby required to ascertain the value thereof, and admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed." It is to be observed, that there are no words in this section, like those in the 54th section, relating to annuities, namely, "by whatever assurance the same be secured;" it may therefore be inferred, that the provision was not intended to include all liabilities, nor to let in every kind of contingent debts. The word "liability" is nowhere used in the 56th section. The question therefore is, to what species of demands that section was intended to apply? In the first place, the bankrupt must have "*contracted a debt.*" Now, the meaning of the word "*debt*" cannot be misunderstood; it must be such a debt contracted before the bankruptcy, as, upon the happening of an event after the bankruptcy, will support an action of assumpsit to recover the debt, but not an action merely for damages. In the next place, the debt must be "*payable on a contingency,*" that is, the uncertainty of the event, or the time, when the debt may become payable. 3dly. The

contingency must be one "*which shall not have happened before the issuing of the commission*;" the meaning of which is, that the event, or the time, in which the debt becomes payable, must happen after the bankruptcy. But the foundation-stone of all is, that it must be a *debt contracted*, not an uncertain claim depending on damages, but one strictly recoverable as a debt. This appears obvious from the difference of the provision made in this section from those in section 53, relating to bottomry and respondentia bonds, as to the payment of the dividends on the proof. By section 53, the dividends are not receivable until *after the loss or contingency* shall have happened; while, by section 56, the creditor may receive dividends on his proof *before* the happening of the contingency.

The cases on this subject may be thus distinguished:
1. where the debt is a specialty debt; 2. where it is one on simple contract.

1st. Where the debt is a specialty debt. In *Ex parte Grundy (a)*, the bankrupt had given a bond to pay 2000*l.*, if his wife or any of his children should survive him; in 1803 a commission issued against him, under which he obtained his certificate; and in 1825 he died, leaving issue; in this case, the sum being certain, though the event was uncertain, the bond was held to be provable under the commission. But the legislature has not given the right of proof on a covenant for unliquidated damages; but merely where the obligation or covenant is for a sum certain. Thus, in *Ex parte Tindal (b)*, the covenant was for payment of a sum certain, though depending on a contingency; and Lord C. J. *Tindal*, in delivering the judgment of the Court,

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(a) Mont. & M. 293.
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(b) Mont. 375, 462.
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said, " We do not found our opinion upon the technical ground that an action of debt will lie in point of form, but upon the substance and effect of an absolute covenant, that a man's executor shall pay a sum of money to certain persons, upon certain trusts, which, in our opinion, constitutes a debt." The case of *Ex parte Lewis* (a) decided that a guarantee by bond was provable. Some doubt indeed has been thrown on this decision, but without foundation; for it was decided, before the passing of the 6 Geo. 4. c. 16., that if a surety had received from the principal an instrument of indemnity, payable before the bankruptcy of the principal, it was provable by the surety under the commission against the principal; *Goddard v. Vanderheyden* (b). The next case on a bond is *Ex parte Marshall* (c), which seems to be an exception to the general rule applicable to proof on bonds; as it was there held, that a contingent liability, though secured by bond, was not provable. If that case is good law, therefore, it follows, that when a claim is capable of being enforced only by an action for damages, it is not provable under a commission.

There is another class of cases relating to covenants of sureties; in which it is held, that there is no right of proof, because the demand is for unliquidated damages. The first of these is *Atwood v. Partridge* (d), where the defendant covenanted for the due payment by a debtor of the premium on a policy of insurance, which he had assigned to his creditors; and it was decided, that this was not a debt contracted within the meaning of the 6 Geo. 4. c. 16. s. 56., but merely a demand for unliquidated damages. So, in *Ex parte Thompson* (e) it

(a) Mont. & M. 415.

(b) 3 Wils. 270.

(c) 3 Deac. & Chit. 120.

(d) 4 Bing. 209.

(e) 2 Dea. & Ch. 126; Mont. & B. 219.

was held, that a covenant by a surety for the payment of an annuity, if the grantor made default, was not provable; on the ground, that it was not a debt contracted by the surety before the bankruptcy, but only a demand recoverable as damages; the Chief Judge observing, that to entitle the party to prove by virtue of the 56th section, it must be made out, that the bankrupt "owed something at the issuing of the commission, although it depended upon a contingency whether it would become payable." There is no provision in the 6 Geo. 4. c. 16., which extends the right of proof to any sum under marriage articles, unless there is a covenant for payment of a sum certain. So cautious indeed have the Courts been, in confining the proof even of a judgment to a sum certain; that in *Johnson v. Compton* (a); where a surety for the payment of an annuity, besides covenanting to pay it if the grantor made default, executed a warrant of attorney, on which judgment was entered up, — it was held, that as the surety did not covenant to pay the annuity in all events, but only when the grantor made default, he therefore never undertook to pay the whole sum, and consequently that his estate was not liable to that extent. [*Erskine*, C. J. I take it that the judgment in that case was only for what arrears of the annuity were due at the time of entering up the judgment; it therefore did not create a debt for subsequent arrears.] The next case is *Wilmer v. White* (b), which was one under the Insolvent Act, and in which it was held, that an interlocutory judgment obtained before the insolvency of the debtor, was not sufficient to entitle the plaintiff to prove the debt on the judgment.

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(a) 4 Blm. 37.

(b) 6 Bing. 291.

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[*Erskine*, C. J. There was no judgment debt in that case, because the final judgment was not obtained until after the adjudication of insolvency. The ground on which this Court decided *Ex parte Marshall* (a) was, that there must be a *debt* contracted before the bankruptcy. In *Ex parte Myers* (b) I made use of the term *liability*, which in *Ex parte Marshall* I acknowledged I was not quite warranted in using.] In *Biré v. Moreau* (c) it was also decided, that the amount of taxed costs upon signing final judgment could not be proved, as they did not constitute a debt contracted on a contingency, within the meaning of the 56th section.

The next class of cases relates to creditors on simple contract; it which it has been held, that the demand of a vendor on a contract for the purchase of goods, to be delivered on a future day at a certain price, was not provable under a commission against the vendee, because it was only a claim for unliquidated damages; *Boorman v. Nash* (d). In like manner, an undertaking to pay the acceptor of a bill of exchange the amount of the acceptance, or to indemnify him, was decided not to be a contingent debt, but merely a claim for unliquidated damages; *Yallop v. Ebers* (e).

It seems difficult to understand the distinction, which his Honor the Chief Judge draws in *Ex parte Marshall* (f), between contingent liabilities which may never

(a) 3 Deac. & C. 122.

(b) *Suprà*.

(c) 6 Bing. 291.

(d) 9 B. & C. 145. This decision, though strictly legal, does not seem quite consistent with the general spirit of the Bankrupt Law, which, in taking from a trader the whole of his effects to distribute among his creditors, has deprived him of all means of payment for goods purchased by him under these circumstances. It would be but just that a demand, like this in *Boorman v. Nash*, should be made provable under a commission; and that the bankrupt trader, who fairly gives up the whole of his property to his creditors, should be released from all his previous trading contracts, whether executed, or executory.

(e) 1 B. & Adol. 698.

(f) *Suprà*.

become debts, and contingent debts which may never become payable, — holding, that in the first case no proof could be received, but that in the latter case it might. If by a contingent liability be meant a liability on a covenant, which can never become a debt until judgment has been obtained in an action on the covenant, the position is indisputable, and means only, that a demand for damages not ascertained is not provable under a fiat in bankruptcy. And when it is said, that in *Ex parte Myers* (a) there was a debt, this does not seem to be quite reconcilable with the law on the subject, according to which, the only mode of enforcing a contract of guarantee is by special action on the case for damages.

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ERSKINE, C. J.—What I meant to say in *Ex parte Marshall* was this : that there was a distinction between the cases of *Ex parte Thompson* and *Ex parte Tindal* (b). In *Ex parte Thompson* there was a contingent liability that might never terminate in a debt. In *Ex parte Tindal* there was a debt, but a contingency whether it would ever become payable. In the case now before the Court, the bankrupt incurred a liability to indemnify *Ewart & Co.*, the acceptors of the bills, pursuant to the terms of the guarantee; and it depended upon the event of *Ewart & Co.* being called upon to pay those acceptances, whether that liability would ever become a debt. Upon the argument of *Ex parte Marshall*, I was led to consider my former judgment in this case; and it there occurred to me, that I had not sufficiently alluded to this distinction, and had laid down the position too boldly; and, as upon reference to my notes I could not clearly ascertain whether *Ewart & Co.* had paid

(a) *Suprà.*

(b) *Suprà.*

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any of their acceptances before the bankruptcies, or whether they had been provided for at maturity by *Lyne & Sudell*, I made the observation referred to in the latter part of the passage now alluded to; for if *Ewart & Co.* had not actually paid any of their acceptances before the bankruptcy of *Henry Sudell*, he would have contracted a liability, but no debt; whereas, if they had paid their first acceptances, a debt would have been thereupon contracted by *Henry Sudell*, though not payable at all events until the substituted bills became due,—and then payable by him, only; upon the contingency of *Lyne & Sudell* not providing for the substituted bills. It is now admitted, that acceptances to the amount of the debt claimed had been paid by *Ewart & Co.* before the bankruptcy of *Henry Sudell*, and that the bills running at the time of his bankruptcy were renewed, or substituted bills, which *Ewart & Co.* were obliged to pay, and had paid before the tender of their proof. This fact, therefore, relieves the case from the difficulty suggested by me in *Ex parte Marshall*.

Mr. *Montagu*, and Mr. *Richards*. Still, according to your Honor's words in the judgment referred to, there must be a debt contracted, to give a right of proof. Now, where a contract merely sounds in damages, it is not a contract for a debt, and therefore not provable under a fiat. Such is a contract on a guarantee, the only mode of enforcing which is by an action of special assumpsit to recover damages for the breach of the promise contained in the guarantee (a). In *Ex parte Stead* (b), where a petitioning creditor had sued

(a) Fell on Mercantile Guarantees, 1050 referring to Anon. 1 Ventr. 293; *Kent v. Derby*, 1 Ventr. 311; *Roger v. Roger*, 2 Ventr. 36; *Butcher v. Andrews*, 1 Salk. 28; S. C. Carth. 446; *Marriot v. Lister*, 2 Wils. 141; *Mines v. Sculthorpe*, 2 Camp. 215.

(b) 1 G. & J. 301.

out a commission on a guarantee given by the bankrupt, after default had been made by the principal; and two sets of Commissioners had found that it was not a debt sufficient to sustain a commission; and the petitioning creditor applied to the Lord Chancellor to order the Commissioners to declare the party a bankrupt; all that Lord *Eldon* did, was, to order the last commission to be superseded, and that a new commission should be directed to another list of Commissioners. What we now contend for is, that no debt is provable under a commission, which is payable only on an event happening after the bankruptcy of the party contracting to pay such debt, except in the cases provided by the statute of bottomry and respondentia bonds. If the creditor cannot go in and prove at the date of the commission, he cannot go in and prove afterwards; for the moment the commission issues, if any debt is provable at all, he may apply to the Commissioners to set a value upon it, and prove for the amount. Apply then the law on this subject to the words of this guarantee. The bankrupt guarantees to *Ewart Myers & Co.* the payment of 12,000*l.*, in consequence of their allowing *Lyne* and *Thomas Sudell* to draw upon them to that amount, and accepting three drafts accordingly; it being distinctly understood, that payment of these drafts is to be provided for either by the bankrupt, or by *Lyne* and *T. Sudell*, in direct discountable bills, fourteen days at the least before they fall due; and the bankrupt further guarantees the due payment of all remittances made to *Ewart & Co.* by *Lyne* and *Thomas Sudell*. Now is this such a debt as the Commissioners could set a value upon, within the meaning of the 56th section? How could they ascertain the value of the contingency, that is, the probability that *Lyne* and *T. Sudell* would

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provide for these drafts? The only way to ascertain this, if *Lyne* and *Sudell* had continued solvent, would have been for the Commissioners to summon them before them, and to examine into the state of their circumstances. But it can never be supposed, that the legislature intended to give such a power on a controversy respecting the right to prove a debt.

It is said, however, that when the event occurs after the bankruptcy, the difficulty is removed; but it is submitted that this is a mistake, as to the true meaning of the provision contained in the 56th section; the object of which was, not to suffer the right of the creditor to be varied by any event after the bankruptcy,—but merely to permit him, if he relied on his own judgment as to the value of the contingency at the time of the bankruptcy, to wait until the event should happen. If the event be incapable of valuation at the time of the bankruptcy, the demand is not provable. Can it be contended that if the event were, whether a widow would marry again,—an event which, from its uncertainty, is incapable of valuation,—that when the marriage does take place, though after the bankruptcy of the covenantor, the demand would then be provable? The decision in *Ex parte Eagle* (a) is wholly contrary to such a position. The right to prove must exist at the period of the bankruptcy, although the creditor has a right to postpone the proof until the happening of the contingency, subject, however, to any loss he may sustain by a previous division of the assets among the bankrupt's creditors.

On the former hearing of this case the decision was founded on the assumption, that credit was given by *Ewart & Co.* to the bankrupt, and not to *Lyne &*

(a) Mont & M. 422.

Sudell; but that fact is contradicted by the affidavits in support of the present petition, which state that no account of the sales of the goods was ever rendered by *Ewart & Co.* to *Henry Sudell*, but only to *Lyne & Sudell*. Now the rule of law is clear, that a party dealing with an agent as a principal, in the full knowledge that he was merely an agent, cannot afterwards turn round on the principal after thus treating the agent as the principal; though if the party was ignorant of the fact of the agency, the principal is then responsible (a). In this case, the affidavits of the assignees state that *Lyne and Thomas Sudell* were the agents of the bankrupt *Henry Sudell*,—that *Ewart & Co.* well knew that fact, and, notwithstanding, dealt with *Lyne & Co.* as the principals. The question therefore is, to whom credit was given by *Ewart & Co.*; if given to *Henry Sudell*, the proof is right; but if given to *Lyne & Sudell*, it ought to be expunged. It has been attempted to be shown by the affidavit of *Myers*, in opposition to the present petition, that *Ewart & Co.* gave credit to *Henry Sudell*; but it appears from every book of *Ewart & Co.*, that the credit was given to *Lyne & Sudell*, and not to *Henry Sudell*; and not one of *Henry Sudell*'s letters holds out to *Ewart & Co.* any personal responsibility of himself, but they merely mention certain property which was to be a security for their advances to *Lyne & Sudell*. It is sworn expressly, that *Ewart & Co.* never gave credit to *Henry Sudell*, and this has not been contradicted. *Ewart & Co.* paid the bills as they became due, having other bills supplied by *Lyne and Sudell*, to none of which was *Henry Sudell* a party. If he was a principal in these transactions,

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(a) Paley, on Principal and Agent, 246.

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how comes it that his name did not appear upon some of these bills? The very circumstance of *Ewart & Co.* taking this guarantee from *Henry Sudell* shows, that they did not consider him the principal, but merely as the surety; for the word “guarantee,” *ex vi termini*, implies a surety, and not a principal. When was it ever known that a man gives a guarantee for payment of his own debt? [*Erskine*, C. J. Might not this letter have been written by *Henry Sudell* to *Ewart & Co.*, to inform them of the amount for which he had authorized his agents to draw?] When a mercantile man uses the word “guarantee,” he uses a word, well understood among merchants as rendering the person so using it a surety. The words are here,—“I hereby *guarantee* you that amount.” If the expression had been “I will pay you,” or “I undertake to pay you” the amount, that indeed might have rendered the party a principal. But the word “guarantee” implies suretyship, and the possible failure of a principal; *Ex parte Thompson* (a). The question therefore is, whether this is a debt, or merely a liability, and whether *Henry Sudell* did, or did not, become primarily liable to *Ewart & Co.*

Mr. *Kindersley*, who appeared for Messrs. *Ewart Myers & Co.*, the former petitioners, and the respondents on this petition, was stopped by the Court.

ERSKINE, C. J.—If the very able argument, that has been pressed on the Court on the present occasion, had in any way shaken the opinion I expressed on the former hearing of this case, I should have had no hesitation in retracing my steps; but, as it is admitted that

(a) 2 Deac. & Ch. 126.

Ewart Myers & Co. had, before the bankruptcy of *Henry Sudell*, paid bills which they had accepted upon the faith of his engagement, to a larger amount than the balance now claimed, I am of opinion, that whether this instrument be taken as an original undertaking by *Henry Sudell* as principal, or whether it be considered as a guarantee, in the strict sense of the word, the amount of the bills so paid by *Ewart & Co.* would be provable under the commission. I confess, however, that I should rather take the instrument in the light in which *Sir J. Cross* considers it, namely, an original undertaking on the part of *H. Sudell* to pay (to the amount specified) bills drawn by his agents, *Lyne* and *T. Sudell*, upon *Ewart Myers & Co.* If so, then, there can be no doubt as to the right of proof, independently of any question under the 56th section of the Bankrupt Act; for the moment *Ewart Myers & Co.* paid any bills accepted by them on the faith of this undertaking, an absolute debt to the amount of such payment was incurred by *Henry Sudell*, which would continue to exist until satisfied by payment of the discountable bills specified in the agreement.

But I think, even if the instrument be not considered as an original undertaking of *H. Sudell* as principal, but as a mere guarantee on his part, that the balance left unpaid by him at the date of his commission would constitute a provable debt, within the meaning of the 56th section. It appears by the terms of the guarantee, that when the drafts accepted by *Ewart Myers & Co.* became payable, the payment of them was to be provided either by *H. Sudell*, or by *Lyne* and *Thomas Sudell*, in direct discountable bills, fourteen days at the least before they fell due. Now, though upon the original

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acceptance of the bills by *Ewart & Co.*, nothing more than a mere liability to indemnify, and not a debt, would have been contracted either by *Lyne* and *Sudell*, or *Henry Sudell*,—yet, as *Ewart & Co.* were obliged to pay those acceptances when they became due, the amount must be considered as so much money paid by them to the use of *Lyne* and *Sudell*, raising an absolute debt due from them, and at the same time creating a contingent debt from *H. Sudell*, payable upon the failure of *Lyne* and *Sudell* to provide for the substituted bills, according to the terms of the guarantee. At the time of his bankruptcy, therefore, *Henry Sudell* had contracted a debt payable on a contingency which had not then happened, the substituted bills having, at the issuing of the commission, more than fourteen days to run. If the proof had been tendered before the substituted bills became due, the right to prove would have depended on the question, whether the debt were then capable of valuation. But when the proof was tendered and rejected, these bills had become due, and had been paid by *Ewart & Co.*; and therefore the contingency, on which the payment of the debt contracted by *Henry Sudell* was to depend, had already happened; consequently, the debt, which was contingent at the date of the commission, had since become absolute; and was therefore, in my opinion, provable under his commission. It has been contended, however, that notwithstanding there might be a debt contracted, yet if it was incapable of valuation at the date of the commission, it could not be provable after the happening of the contingency. But I do not understand, that the second part of the 56th section is necessarily confined to cases comprehended within the first branch of the clause, and

I can perceive no reason why the second part should not apply to cases, where the contingency happens after the issuing of the commission, although the debt, from the nature of the contingency, might have been incapable of valuation until the event had happened. In *Ex parte Thompson* (a) I am reported to have said, that to constitute a debt payable on a contingency within the 56th section, it must be a debt capable, *à priori*, of valuation. If such an observation was made from the bench, it must have fallen from one of my learned colleagues,—certainly not from me; for my opinion has always been, that where the contingency, on which the payment of a debt depends, happens before the declaration of a final dividend, and before the bankrupt obtains his certificate, the creditor may, under the latter part of the 56th section, come in and prove his debt under the commission, although at the date of the commission the debt might have been incapable of valuation. In declaring this opinion, I believe that I am not contravening any decided case on the subject; and it seems to me in unison with the spirit of the 56th section, and with the general intent of the legislature, as manifested throughout the statute; which, on the one hand, gives a right to every creditor, to whom the bankrupt was in any way indebted, to share in the assets of his estate,—and, on the other hand, releases the bankrupt from all description of liabilities, where the amount of the debt can be estimated before the assets are distributed. I do not mean to say, that on every guarantee of a bankrupt for the payment of bills drawn by a third party, a debt must necessarily arise; because, if the bills were running at the time of the bankruptcy of

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(a) Mont. & B. 228. S. C. 2 Dea. & Ch. 134, where this dictum does not appear in his Honor's judgment.

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the party entering into the guarantee, they would not constitute a debt contracted by him.

As to the question, to whom credit was given by *Ewart, Myers & Co.*, this is entirely a question of fact; but it appears clear to me, that they looked to *Henry Sudell*, as their principal debtor. It does not follow, because they had something beyond his mere personal security, namely, the deposit and pledge of goods, that they did not mean to look to him for the payment of any balance, if the proceeds of the goods should be insufficient to cover their advances. But it has been urged, that as it appears from the books of *Ewart & Co.*, as well as from those of *Lyne and Sudell*, that the accounts of sales, &c, were rendered by *Ewart & Co.* to *Lyne and Sudell*, and not to *Henry Sudell*,—that circumstance furnishes satisfactory proof, that *Ewart & Co.* looked to *Lyne and Sudell* for any eventual deficiency. It is certainly a circumstance worthy of attention, but not sufficient to outweigh the other evidence in the case. In the first place, *Lyne and Sudell*, acted throughout as the avowed agents of *Henry Sudell*. The money was advanced by *Ewart & Co.* for his accommodation, and *Lyne and Sudell* nowhere appear to have directly pledged their personal responsibility. In the correspondence between *Ewart & Co.* and *Lyne and Sudell*, the latter speak of the advances, as made to *Henry Sudell*, through them; and the former speak of the advances to *Lyne and Sudell*, on his account. In the several notes, also, from *Henry Sudell*, which accompanied each pledge of the goods, he speaks of the monies which *Ewart & Co.* should advance or pay to *Lyne and Sudell*, and not which they should lend to them. If the latter expression had been used, it might have implied, that the money was to

be advanced on the credit of *Lyne* and *Sudell*, and that the goods were merely pledged as a collateral security; but the language used by all parties is perfectly consistent with the view taken of this question by the Court upon the former hearing. And it appears to me, that the manner of keeping the accounts, was adopted by the parties, for the purpose of keeping these transactions distinct from their several other dealings with *Henry Sudell*. I am of opinion, therefore, that the decision of the Court upon the former hearing was correct, and that this petition must be dismissed with costs.

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Sir J. Cross.—I cannot help expressing my regret, that there is no fixed rule of this Court, limiting the period within which a party should apply for a rehearing. In the present case, more than a year has elapsed since the former judgment of this Court was pronounced; and to allow a re-hearing after so long a period of time, is wholly contrary to the practice pursued in the Courts of Law, where a new trial must be moved for within the first four days of the next term after verdict. In considering this case, I shall first advert to the question as to the right of proof for the 7000*l.*, which is entirely a question of fact. On the former hearing, the Court decided that the proof ought to be admitted; and I think, that the petitioners have now shown nothing to disturb the opinion, which the Court expressed on the former occasion.

With regard to the guarantee.—my judgment, when this case was last before us, was founded upon the wording of the particular instrument that passed from *H. Sudell* to *Ewart & Co.*, as well as on the ground that

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he was dealing with them as principal,—and not on any question relating to contingent debts; for it appeared to me, that the words of the document in question, “that payment of these drafts is to be provided for either *by myself*, or Messrs. *Lyne and Sudell*,” implied it to be an original undertaking from *Henry Sudell* to *Ewart & Co.*, as a principal, and not in the character of a surety for the debt of another. But I must say, it has always struck me as a question of extreme nicety, whether any guarantee came within the 56th section of the Bankrupt Act; and if the document, which has been so often referred to, was a mere guarantee from the bankrupt for the debt of a third person, I am not prepared to say what my decision would be. But I do not think, that that is the essential point we have to consider in this case; for we ought to look to all the circumstances, under which this security was given. *Ewart & Co.* were the brokers of *Henry Sudell* at Liverpool, and *Lyne and Sudell* were his general agents there. *Henry Sudell*, wishing to obtain the name of *Ewart & Co.* to his bills, applied to them to accept bills drawn by *Lyne and Sudell*; and to induce them to do so, gave to *Ewart & Co.* the undertaking, which has been termed a guarantee; the meaning of which, in my opinion, was this:—“If you will accept bills drawn by my agents upon you, to a certain amount, I engage that either they or I will provide for taking up the bills fourteen days before they become due;”—or, in other words, “if you will accept my agent’s drafts, which for divers reasons I do not like to accept myself, I will take care to provide funds for their due payment.” The term “guarantee,” made use of in the letter addressed by *Henry Sudell* to

Ewart & Co. was certainly not the most appropriate one; but the real meaning of it, I think, cannot be mistaken, when we advert to the relation of the respective parties. My opinion is, that *Henry Sudell* intended to deal with *Ewart & Co.* as a principal, and that he meant to be considered as if he had indorsed the bills drawn on them by his agents *Lyne* and *Sudell*. I therefore think, that there is no foundation for this petition for rehearing.

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Sir G. ROSE.—The consideration I have for the opinion of the gentlemen, who have brought this matter a second time before the Court, alone induces me to think it necessary to offer any remarks on the present occasion; for the obvious conclusion from all the facts of the case appears to me, to be no other than what my learned colleagues have drawn. I now repeat, as I said on the former hearing of this case (a), that where a guarantee is forfeited before the bankruptcy of the guaranteeing party, the debt becomes absolute against him, and the practice has always been to admit it to be proved under his commission. It may be laid down indeed as a general rule, that so far as guarantees are concerned, a debt provable, and a petitioning creditor's debt, are convertible terms; for in the case referred to of *Ex parte Stead* (b), it is clear, that (as Lord *Eldon* refused to supersede the commission) he thought the guarantee in that case was a good petitioning creditor's debt. The meaning of the word "guarantee" is to be ascertained from the nature of the instrument in which it is used, as well as from the nature of the transaction between the parties; and the conclusion does not necessarily

(a) *Ex parte Myers*, 2 D. & C. 251.

(b) 1 G. & J. 301.

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follow, that the party using the term is merely a surety. The question here therefore is, not simply on a guarantee, technically so called. There are two ways of looking at it; first, as an undertaking from *Henry Sudell* to repay to *Ewart & Co.* advances made by them to a specified and fixed amount. Is not that a contract of debt? The mode of payment is, no doubt, a circumstance to be noticed; but that no further affects the contract, than showing how the debt was to be paid. But put it the other way. Let it be assumed, that this document was not a direct undertaking from *Henry Sudell*, as a principal,—but merely a guarantee for the debt of another. If viewed in this light, even, there appears to have been an absolute debt accruing before the bankruptcy from *Henry Sudell* to *Ewart & Co.*; for if we look into all the circumstances of the case, we find that the contingency which had previously happened, in the insolvency of *Lyne* and *Sudell*, showed very plainly that they were wholly unable to provide for the payment of the drafts accepted by *Ewart & Co.* If the contingency, however, had happened after the bankruptcy, and any doubt should arise whether it would then constitute a provable debt, we are not to forget, that the 135th section of the bankrupt statute declares expressly that the act shall be construed beneficially for creditors, and therefore would, on this occasion, give the creditor the benefit of such doubt. The leading intent of the statute is, first, to distribute the bankrupt's assets legally amongst his creditors,—and then to release the bankrupt from all debts and demands, which the depriving him of his property has prevented him from discharging. The 121st section relating to the certificate declares, that every bankrupt, who shall have

duly surrendered and conformed himself, shall be discharged, not only from all debts due by him when he became bankrupt, but also *from all claims and demands made provable under the commission*. This plainly shows, that many liabilities, which are not strictly *debts*, and for which an action of *debt* would not lie at the time of the bankruptcy, were nevertheless intended to be provable under a commission. For every one knows, that an engagement to do a certain act, though by the non-performance of it a party might sustain pecuniary damage,—as, for instance, a covenant to replace stock,—would not be the subject of an action of *debt*; the only remedy being by an action for damages; yet, if the breach of the engagement took place before the bankruptcy of the party who was bound to make the transfer, and the amount of the damages could be ascertained by the Commissioners, the demand would then be provable (a). It is not necessary, however, on this occasion, to express any general opinion on the question, whether all guarantees are provable under the 56th section; for my judgment is founded upon the construction of the particular instrument in this case, which is more the undertaking of a principal, than the guarantee of a surety.

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Petition dismissed with costs.

(a) And see 1 Deac. B. L. 283.

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Ex parte EDWARD LOWE SIDEBOTHAM, and GEORGE BEECH, and JOHN ALLCOCK.—In the matter of WILLIAM BARRINGTON.

Gray's Inn Hall,
July 14.

Upon a sale of the bankrupt's mortgaged property, made under the general order, the Court of Review has jurisdiction to enforce a specific performance of the contract by the purchaser.

A purchaser, who, with full knowledge of certain objections to the title, granted a lease of the property to a third person, was held to have waived the objections to the title.

THIS was the petition of the assignee of the bankrupt, and of the two executors of a mortgagee for a term of years granted by the bankrupt, praying for the specific performance of a contract by the purchaser of the mortgaged property, under the following circumstances :—

The bankrupt, being seised in fee of a piece of land on Sandbach Heath in the county of Chester, by indenture dated the 3d February 1825 demised this property to *Samuel Beech* for 1000 years, by way of mortgage, for securing the sum of 400*l.*, and interest at 4*l.* 10*s.* per cent. *Samuel Beech*, the mortgagee, died on the 18th December 1828, leaving the two petitioners, *George Beech* and *John Allcock*, his executors.

On the 22d February 1833, a fiat issued against *William Barrington*. The usual account was taken by the Commissioners of the mortgage debt and interest, under the general order; when it was found, that 490*l.* was due from the bankrupt for principal and interest up to the date of the fiat; and the Commissioners made the usual order for the sale of the property. In pursuance of this order, the property was put up to sale by auction on the 5th June 1833, when *William Barrington*, the bankrupt's son, attended the sale, and became the purchaser at the sum of 370*l.*, and gave his promissory note for 37*l.*, the amount of the deposit. On the 6th of June an abstract of the title was delivered to the attorney of *William Barrington*,

who shortly afterwards executed a lease of the property to one *Ralph Arden*, who was in the occupation of it previous to the bankruptcy, and continued so at the time of presenting this petition. The promissory note was never paid by *William Barrington*, nor any part of the purchase money; and on the 5th October last the petitioners called upon him to fulfil his contract, and offered to execute a proper conveyance to him, on payment of the purchase money.

The petition prayed, that *William Barrington* might be ordered to pay the 370*l.* with interest at 4*l.* per cent. from the 1st October 1833, into the Bank of England, in the name of the accountant-general; and that the same might be applied in paying the costs of the sale, and afterwards in satisfaction, as far as it would extend, of what was due to *Beech* and *Allcock* in respect of the mortgage; and that *William Barrington* might be ordered to pay the costs of this application.

The objection on the part of the respondent to complete the purchase was, that the bankrupt in the year 1829 had taken the benefit of the Insolvent Debtors' Act, and that the petitioning creditor's debt under the present fiat had been then included in his schedule. It was contended, therefore, that the fiat was invalid; and that the bankrupt's assignee could not make a good title to the purchaser, as all the property of the bankrupt (which comprised the equity of redemption of the estate in question) was by law vested in the provisional assignee of the Insolvent Court, and the assignee under the bankruptcy could have no control whatever over it.

Mr. Swanston, *Mr. Teed*, and *Mr. Russell*, appeared in support of the petition. If there was any doubt,

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whether this Court would not, in a case of bankruptcy, have jurisdiction to compel the specific performance of a contract, it has unquestionably that jurisdiction, where an agreement to purchase has been made at a sale, under an order of the Court. The sale here took place, in pursuance of an order of the Commissioners, which in effect must be considered as an order of this Court, it being founded on the general order (a). In *Ex parte Gould* (b), the purchaser of the bankrupt's mortgaged property at a sale before the Commissioners, under the general order, was, upon a petition in bankruptcy, ordered to complete his purchase. Of the jurisdiction of this Court, therefore, to compel specific performance, there can be no doubt.

With respect to the want of title,—as the purchaser took possession of this property by granting a lease of it to a third party, with full knowledge of the title as it stood, that objection, though otherwise well founded, was waived in the present instance; *Burnell v. Brown* (c), *Marg. of Anspach v. Noel* (d), *Fleetwood v. Green* (e), and *Fludyer v. Cocker* (f). Where indeed possession is taken, on condition that a title is made out at a future day, it is admitted that such a possession does not amount to a waiver. But here the defect of title, if any, must have been known at the very moment of the sale,—or, at all events, on the following day, when the abstract of the title was delivered to the purchaser's attorney; and the granting a lease of the property to another person, is a far less equivocal act to show the adoption of the purchase, than merely taking corporal possession of

(a) See *Ex parte Partington*, 1 B. & B. 209; *Ex parte Green*, 1 Atk. 202.

(b) 1 G. & J. 231.

(c) 1 J. & W. 168.

(d) 1 Mad. 310.

(e) 15 Ves. 594.

(f) 12 Ves. 27.

the property. Where a sale is made under an order of a Court, a much less interference of the purchaser with the property sold will bind him to an acceptance of the title, than where the purchase is *in pais*; as, for instance, the payment of the purchase money into Court.

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Mr. *Montagu*, Mr. *Bethell*, and Mr. *Rogers*, for the respondent. The only case adduced, in favour of the jurisdiction of this Court to compel the specific performance of a contract, is that of *Ex parte Gould* (a); and of that it is to be observed, that it was decided *ex parte* (b), and therefore a very questionable authority. There are serious objections to such an extension of the powers of this Court, which was established solely for the purpose of deciding on questions in bankruptcy, of which the present case, except in name, is wholly independent. On a question of specific performance, many complicated points of title may arise; to determine which this Court has not, like the Courts of Chancery and Exchequer, the machinery of Masters to assist it in its judgment. For, whatever may be the abilities of the Registrars of the Court in matters of bankruptcy, the legislature never intended to invest those officers with the functions of a Master in Chancery, in deciding and reporting on matters of title to real property. These matters must therefore be investigated by the Court itself, which would in that case be occupied for an indefinite length of time in discussing questions having no relation to bankruptcy law. A waiver of an

(a) *Supra*.

(b) In *Ex parte Lucas, re Oldham*, 3 Dea. & Chit. 157, Sir G. Rose seems to doubt the authority of the case of *Ex parte Gould*.

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objection to a perfect title has, no doubt, often been presumed from circumstances; but never has the Court gone the length of saying, that an objection, which would deprive the purchaser of even the shadow of a title, was waived by the slightest act on his part showing a willingness to complete the purchase. If the purchaser in this case be declared to have waived a substantial objection to the title, and he is ordered to pay his purchase money to-day, to-morrow may deprive him wholly of the subject of his purchase. For the objection here is, that the equity of redemption of the bankrupt in this property is vested in the assignee of the Insolvent Court, over whom this Court has no jurisdiction. The 7 Geo. 4. c. 57. s. 13. (a), after declaring that filing a petition in the Insolvent Court shall be deemed an act of bankruptcy, and that any commission thereon, issued within two calendar months, shall avoid the conveyance made to the insolvent's assignee, goes on to provide, that the filing of such petition shall not be deemed an act of bankruptcy, unless the party be declared a bankrupt within two such calendar months as aforesaid, "but that every such conveyance and assignment shall be good and valid, notwithstanding any commission of bankruptcy under which such person shall be declared bankrupt after the time so advertised as aforesaid, and after the expiration of such two calendar months as aforesaid." Now, as the adjudication of bankruptcy in this case was not within two calendar months after the filing of the petition in the Insolvent Court, the assignee of that Court, and not the bankrupt's assignee, is lawfully entitled to this property; and therefore any conveyance by the bankrupt's assignee to the purchaser would be a perfect nullity.

(a) This act is continued by the 11 Geo. 4. and 1 Will. 4. c. 38.

But, with respect to the alleged waiver of the objection to the title, we say, that the acts done here by the purchaser do not amount to such waiver. If he entered upon the property at all, he entered as mortgagee, and not as the purchaser of the equity of redemption; for he could not purchase what the assignee had no power to sell. In *Burnell v. Brown* (a) the circumstances were much stronger than in the present case; for there a considerable portion of the purchase money had been paid, and indulgence granted as to the remainder, and the conveyance was drawn, and possession was deliberately taken after the delivery of the abstract, on which the objections to the title were apparent. Here, the taking possession, if it can be called such, occurred before the abstract was received. The intended lessee of the purchaser was in possession of the property, under the bankrupt, long previous to the bankruptcy. On reference to the lease, also, it appears that it was only to take effect, if a good title were made to the purchaser. But, as an assignment under the Insolvent Act precludes the possibility of this being done, the lease becomes a perfect nullity. Suppose an agreement between *A.* and *B.*, that if *A.* was declared the purchaser of certain property about to be sold by *C.*, he would grant a lease to *B.*, can this be construed into a contract of purchase between *A.* and *C.*? Such a proposition is too monstrous to be entertained for one moment. Had the intended lessee here been out of possession when the lease was granted, the case might have been different. But, taking the facts as they stand, the lease was a mere escrow, and no privity of contract can be deduced from it, or even any equity, as between the bankrupt's as-

1834.

Ex parte
SIDEBOOTHAM
and others.

(a) 1 J. & W. 168.

1834.

Ex parte
Simsbournham
and others.

signee and the respondent. In *Deverell v. Lord Bolton* (a) it was held, that even an approbation of title by the purchaser's counsel, if prematurely given, was not a waiver of any valid objections to it. In several other cases, also,—more especially in that of *Barroes v. Oakley* (b), where the judgment of the Master of the Rolls applies very forcibly to the present case,—it has been held, that objections to title were not waived by taking possession, or even by the exercise of acts of ownership (c).

Another insurmountable objection to this petition is, that if the Court should award a specific performance of the contract, it must, in order to effectuate its order, direct the provisional assignee of the Insolvent Court (who has clearly the legal title to this property) to join in the conveyance. But, as the Court has no jurisdiction over him, his refusal to obey the order will render it nugatory; for the Court will have no power to enforce his obedience.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—Many objections have been raised by the counsel for the respondent, to this Court entertaining jurisdiction in the present case, by reason of the alleged difficulty that might arise in enforcing our order against some other party to be affected by it, and our want of proper officers to investigate questions of title. There is no ground, however, for such objections on the present occasion; and when any case hereafter may arise which involves such difficulties, it will be then time enough for us to consider, whether we will

(a) 18 Ves. 505.

(b) 3 Swanst. 159.

(c) See Chit. Eq. Index, tit. Vendor and Purchaser, v. vi. vii.

take the burthen of deciding the case on ourselves, or send it to another tribunal where greater facilities may exist. With respect to the alleged inconvenience, arising from a want of officers of the Court to inquire into questions of title, that inconvenience does not arise in this case; because we think, that the title has been already accepted. It might have been contended, with some show of reason, that if the sale of this property had taken place merely by directions of the assignee, the Court would then have had no jurisdiction over the purchaser; but, as the property was sold under the general order in bankruptcy, it is in effect under an order of this Court; and therefore the purchaser is clearly brought within the jurisdiction. This is the distinction that has always been drawn, and is amply supported by the case of *Ex parte Gould*(a). But the main question in this case is, has the respondent waived the objections to the title? For if he has not, it must be admitted that they would be tenable. It might, indeed, be difficult to prove that the title was elsewhere than in the assignees under the bankruptcy; but the validity of the fiat is very questionable, and the equity of redemption seems to be unquestionably in the provisional assignee of the Insolvent Court. If it could be reasonably said, that nothing but a shadow has been bought by the respondent, then indeed a very serious question might be raised, whether, notwithstanding the waiver, we ought to order a specific performance of the contract. But it is clear, that some estate or property has been sold; and the question is, how much; for it must be remembered, that this is a sale, not by the assignees alone, but conjointly with the mortgagee,

1834.

Ex parte
SIDDEBORN
and others.

(a) 1 G. & J. 231.

1834.
—
Ex parte
SIDEBOTHAM
and others.

whose title admits of no dispute. The question of waiver, however, is not one of law, but of fact, depending on the special circumstances of the case. The mere taking possession of the property sold, undoubtedly, cannot of itself be construed as a waiver of objections to the title, but operates only as evidence of an intention to waive them. Looking, however, at all the facts of this case, it is impossible to doubt, that when *Barrington* the younger executed the lease to Mr. *Arden*, he did so, meaning to adopt the contract, and waive the objections to the title; all of which he must have well known from the very commencement of the transaction. It is said, that the purchaser never took possession of the premises; but is not the possession of the tenant the possession of the landlord? I cannot help suspecting, that the objections insisted upon have not been taken *bonâ fide*; but that they arise from circumstances studiously concealed from our view, which have rendered the purchaser anxious to get rid of the contract altogether. I am of opinion, under all the circumstances, that the purchaser has waived the objections to the title, and that the prayer of this petition must be granted.

Sir JOHN CROSS.—I entertain no doubt, as to our having jurisdiction in the present case, this Court having been invested with the powers both of a court of law, and of equity, in all matters relating to bankruptcy. In the case of *Ex parte Bradley* (a), Lord *Eldon* says, “I am convinced, that it was the intention of the legislature, in giving jurisdiction to the Chancellor in bankruptcy, to give him power to use in bankruptcy the authority used in cases in Chancery, where no specific

(a) 1 Rose, 205.

authority is given by the statutes. In this Lord *Hardwicke* supports me." It has always appeared to me, that an objection to the jurisdiction comes with a very bad grace from a party, after he has suffered the case to be argued on the merits, and has taken the chance of a decision in his favour. He then, in my opinion, submits to the jurisdiction, and it ceases to be competent for him to dispute it. Upon the merits of this case, I perfectly coincide in the opinion expressed by his Honor the Chief Judge. The purchase was made by a son of the bankrupt, acting under the advice of a solicitor knowing of the insolvency. The objection was well known by the party, before he became a purchaser; and he also knew that no one then had claimed, nor has any one claimed since, any outstanding title. It seems to me, that the objection is now set up, merely to slander the title he has purchased, and to enable him to keep possession, without paying for his purchase. If he assumes a right to lease, he must have assumed that he had a title. It has been alleged, however, that it was provided in the lease that it should only be good, if the title was perfected; but the lease has not been produced, and therefore it is not in evidence that there was any such clause contained in it; though if there was, the proposition would be still the same, that the purchaser could grant no lease, if he had no title.

Sir G. ROSE.—It is quite clear to me, that the Court has in this case jurisdiction to compel the purchaser to complete his purchase,—the property having been put up to sale under the general order, which is quite sufficient to give this Court jurisdiction, so as to enforce its order by attachment. But I cannot admit, that jurisdic-

1834.

Ex parte
SIDEBOTHAM
and others.

1834.

Ex parte
SIDENOTHEAM
and others.

tion would be conferred by the mere circumstance of the vendors being assignees,—of the property being that of the bankrupt,—of the parties filing affidavits,—or of the question having been argued on the merits. If the objections to the title had not been waived, and it was necessary to consider them upon the present occasion, this Court would refer the question of title, either to one of its own officers, or to one of its judges. And there would be no difficulty occasioned by the want of proper machinery, as has been suggested; for the Registrars of the Court, being barristers of experience, are perfectly competent to the task. This Court must deal with such machinery as it has. The Registrars are essential appendages to us, in the same manner as the Masters are to the Court of Chancery. Although the mere taking possession does not in all cases amount to evidence of a waiver of objection to the title, yet the only inference I can draw in this case, from the granting of the lease by the purchaser, is, that he had the fulfilment of his contract in view at the time he executed the lease, and that he intended to waive all objections to the title.

The ORDER made was, that the contract ought to be performed, the purchaser having waived the objections and accepted the title of the petitioners; that the purchaser should pay the 370*l.*, with interest at 4 per cent. from the 9th November 1833, into Court within a month, and that the same should be laid out in proper securities; that a conveyance should be settled by Mr. Gregg, the Deputy Registrar, to be executed by the petitioners, and all other proper parties; and that the estate should be delivered up to

the purchaser, with liberty to the vendors to apply to the Court when the conveyance should be executed; and that the respondent should pay the costs of the present application.

1834.

Ex parte
SIDEBOTHAM
and others.

Ex parte JOHN HUTCHINSON.—In the matter of ELIZ,
FREEMAN.

Westminster,
Nov. 12.

THIS was a petition of one of the assignees, praying that the bills of costs of the solicitor to the commission might be referred for re-taxation to a Master in Chancery. It appeared, that the commission issued against the bankrupt on the 29th March 1828, and that the solicitor had delivered to the assignees three several bills of costs for business done under the commission, which had been taxed by the Commissioners at the following sums, that is to say:—the first of such bills, up to the choice of assignees, at the sum of 86*l.* 6*s.* 10*d.*; the second of such bills, from the choice of assignees up to November 1828, at 150*l.* 6*s.* 6*d.*; and the last of such bills, for business done from then up to the present time, at the sum of 22*l.* 10*s.* 6*d.*; the whole of such taxed bills amounting to the sum of 239*l.* and upwards. The petition stated, that the petitioner was a creditor for, and had proved under the commission to the amount of, 100*l.* and upwards, and was now dissatisfied with the taxation of the several bills of costs by the said Commissioners, and therefore prayed a re-taxation.

Where nearly six years had elapsed since the solicitor's bills of costs had been taxed by the Commissioners, and the assignee was a party to that taxation, and to the subsequent payments in discharge of the bills, the Court refused, on his application, to refer them for re-taxation.

In answer to the facts stated in the petition, the respondent swore, that nearly six years had expired since the taxation and payment of these bills; that there were no unfair or improper charges in them, and that the payments therein contained were duly made by the de-

1834.

Ex parte
HUTCHINSON.

ponent; that the petitioner was indebted to the deponent in the sum of 185*l.*, being the balance of a bill of costs for defending an action at law brought against the assignees, which was tried at Gloucester assizes in the spring of 1829; that the payments and disbursements made by the deponent in the defence of such action,—having been obliged to obtain the certificate of the bankrupt, in order to make her an eligible witness on the part of the assignees,—exceeded the sum of 200*l.*; that the deponent had not yet been paid such balance of 185*l.*, but had brought an action against the petitioner, which was still pending, to recover such balance; that he believed the object of the petitioner was to delay the payment of such balance, and to put the deponent to further expense; that the petitioner had never made any complaint as to the charges or allowances of the bills, but, on the contrary, had by a very lengthy correspondence with the deponent been endeavouring to make sale of a policy of insurance on the life of the bankrupt for 500*l.*, in order to pay the deponent; and that the deponent had paid, at the request of the petitioner, 20*l.* and upwards, in order to keep alive such policy, and had never yet been repaid the same.

Mr. Bacon appeared in support of the petition, and *Mr. Swanston contra*.

The COURT refused the application, on the ground that so great a length of time had elapsed since the bills were taxed and paid, and that the petitioner was himself a party to the taxation before the Commissioners, as well as to the payments which had been subsequently made in part discharge of the bills.

Petition dismissed with costs.

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* Most of the cases in this number, relating to Bankruptcy, are digested in the Index to Vol. II., as being also reported in 4 Barn. and Adol.

ABANDONMENT.

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account; the intestate died in 1801, and a commission is issued against the bankers in 1810, notwithstanding which the same partner continued to

receive the dividends and pay them to the intestate's widow, up to the period of his own death, which happened in 1822, some time after which the assignees of the banker claimed a lien on the debenture for a debt due from the intestate to the banking house:—Held, that after so long an abandonment of any claim of lien the assignees could not now sup-

port such claim, and that the debenture also could not be considered as having been left in the order and disposition of the bankers, having been deposited in the nature of a trust. *Ex parte Douglas*, 1833. 3 Dea. & Chit. 310.

Before a mortgagee, with a power of sale, can apply for leave to bid, he must waive his power of sale, and come before the Court in the simple character of mortgagee. *Ex parte Davis, re Hagley*, 1833. 3 Dea. & Chit. 504. S. C. 1 M. & A. 89.

ACCOMMODATION BILLS.

F. & Co. sold cochineal to *John W.*, for which a small part of the price was paid in cash, and the remainder by two bills at four months, but the cochineal was to remain in the hands of *F. & Co.* as a security for the payment of the bills. The bills not being paid when due, *John W.* sent *F. & Co.* two other bills drawn by himself on *Joshua W.* for which no consideration was given to *Josh. W.*, the acceptor. Before these bills fell due both *John W.* and *Joshua W.* became bankrupts, and the price of cochineal had fallen so much in the market, that *F. & Co.* afterwards sold it for not a third of the price at which *John W.* had bought it, and they then proved for the deficiency under *John W.*'s commission:—Held, that they had also a right to prove the amount of the two bills under *Joshua W.*'s commission,

without deducting the proceeds arising from the sale of the cochineal. *Ex parte Bonham*, 1833. 3 Dea. & Chit. 285.

ACQUIESCENCE.

See also CONSENT.

Where nearly six years had elapsed since the solicitor's bill of costs had been taxed by the Commissioners, and the assignee was a party to that taxation, and to the subsequent payments in discharge of the bills, the Court refused, on his application, to refer them for re-taxation. *Ex parte Hutchinson, re Freeman*, 1834. 3 Dea. & Chit. 829.

The Court has jurisdiction to restrain the bankrupt from bringing actions to upset his commission. Thus after twenty-two years and acquiescence the Court will restrain the bankrupt from bringing actions against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 283.

Long acquiescence is enough to refuse to supersede on the application of the bankrupt, but not alone enough to enable the Court to restrain him from bringing actions. *Ibid.* 297.

Petitioning to enlarge the time to surrender is a slight act of acquiescence, but lying in prison under a commitment by a Commissioner is a strong act of acquiescence. *Ibid.* 298.

ACT OF BANKRUPTCY,

Generally.

When a bankrupt petitions to annul a fiat on the ground that he has not committed an act of bankruptcy, the Court will order him to be furnished with copies of the depositions relating to the act of bankruptcy. *Ex parte Smith*, 1833. 3 Dea. & Chit. 101.

Quære, whether the date of a fiat which had not been opened can be altered, so as to give effect to a subsequent act of bankruptcy. *Re Roberts*, 1833. 3 Dea. & Chit. 315.

Its effect.

A London banker, having a branch bank at Edinburgh, stops payment on the 2d January, and writes to his agent at Edinburgh, apprising him of the fact, and directing the business of the branch bank to be discontinued. On the 4th January, before this notice reached the agent, the petitioner pays into the Edinburgh bank 305*l.* 15*s.* in notes and cash, to be remitted to the house in London; but after the news reaches Edinburgh, and whilst the notes were still in the agent's possession, gives him notice not to part with them, and they remained in his hands on the 26th January, when a fiat issued against the banker in London. The agent at Edinburgh having a lien on the funds in his hands, the assignees permitted him to retain the 305*l.* 15*s.* in part satis-

faction of his lien:—Held, that the assignees were bound to refund this sum to the petitioners. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 58.

The same order made as in *Ex parte Cunningham*, *suprà*, although the notes delivered to the banker's agent were not identified. *Ex parte Solomons*, 1833. 3 Dea. & Chit. 77.

The same order was also made in this case. The notes, in this case, were paid in by the customer, on the 3rd January, to a sub-agent of the banker at Glasgow, who remitted them on the 4th to the banker's managing agent at Edinburgh. *Ex parte Wylie*, 1833. 3 Dea. & Chit. 82.

The order made in *Ex parte Cunningham*, confirmed on appeal to the Lord Chancellor. *Ex parte Belcher*, 1833. 3 Dea. & Chit. 87.

What amounts to an Act of Bankruptcy.

A trader being in debt to several persons, leaves this country, in June 1831, for America, with some intention of returning, but does not actually return, nor does he make provision for the payment of all his debts. In September 1833 one of the creditors, whose debt was left unprovided for, issues a fiat against him, which the bankrupt, by his agent in this country, after the forty-second day, petitions to supersede:—Held, (dissent. Sir J. Cross,) that the

fiat could not be superseded without the surrender of the bankrupt:—Held also, *per tot. Cur.* that the continued absence of the bankrupt, under these circumstances, amounted to an act of bankruptcy. *Ex parte Kirkman*, 1833. 3 Dea. & Chit. 450. S. C. 1 Mont. & Ayr. 709.

Conveyance of part of a bankrupt's property, in trust to sell and dispose of the proceeds as he shall direct, is not an act of bankruptcy. *Robinson v. Carrington*, 1833. 1 Mont. & Ayr. 1.

Breaking an appointment to delay creditors, is an act of bankruptcy. *Ibid.*

A trader entitled to large freehold and leasehold estates, but greatly embarrassed, and having committed acts of bankruptcy, conveyed his freehold and leasehold estates to trustees, upon trust to sell or mortgage, and to apply the produce as he should direct. It appeared that the trust deed was executed under advice for the purpose of effecting a conversion of the trader's property, with a view to an arrangement with his creditors, to which he was himself considered incompetent from the state of his health:—Held, that the trust deed was not an act of bankruptcy. *Greenwood v. Churchill*, *Robinson v. Lord Carrington*, 1833. 1 Mylne & Keen, 546.

A trader conveying away property to such an extent as will prevent him from continuing his business and render him insolvent, commits an act of bankruptcy; but those who rely

upon such act of bankruptcy on a trial must show that it was calculated to have the alleged effect, by evidence of the general state of the party's affairs at the time of such conveyance.

It is not sufficient to prove that the trader, under pecuniary pressure, disposed of some articles essential to the carrying on of his business, as that a miller, by bill of sale, transferred his waggon and horses to a creditor who had arrested him. *Wedge v. Newton*, 1833. 4 Barn. & Adol. 831.

An assignment by a trader of his whole stock, with intent to abscond from his creditors and carry off the purchase money, is not an act of bankruptcy when the purchaser pays a fair price for the goods, and is ignorant of the trader's design. *Barter v. Pritchard*, 1834. 1 Adol. & Ellis, 456; S. C. 3 Nev. & Man. 638.

A sale of the whole of a trader's property is not, of itself, an act of bankruptcy.

The party who seeks to treat the sale as an act of bankruptcy, must show some fact from which fraud may be inferred. *Rose v. Haycock*, 1827. 1 Adol. & Ellis, 460 n.

Held by Lord Denman, C. J., Parke and Patteson, Js., and *semble*, per Littledale, J., that the execution of a deed by which a party conveys his whole property to the use of some of his creditors, is a sufficient act of bankruptcy to sustain a commission, though the deed was executed by the bankrupt only, and is not proved to

have been acted upon, or to have passed out of the bankrupt's hands. *Botcherby v. Lancaster*, 1834. 1 Adol. & Ellis, 77; S. C. 3 Nev. & Man. 383.

ACTION AT LAW.

Generally.

Depositions taken before Commissioners of bankrupt, and inrolled by the assignees according to 6 Geo. 4. c. 16. s. 96. are not evidence against them in an action brought to dispute the commission, by disproving the act of bankruptcy on which it is founded. *Chambers v. Bernasconi*, 1834. 4 Tyrw. 531.

In a case within the 92d section of the bankrupt act, (6 Geo. 4. c. 16.) where the assignees went into evidence of the trading in consequence of a notice to dispute, without advertising to the section or relying upon the depositions, and having failed to establish the trading, were nonsuited, the Court refused to set the nonsuit aside. *Johnson v. Piper*, 1833. 2 Nev. & Man. 672.

Case lies for a judgment creditor against a sheriff for not selling within a reasonable time after a seizure under a *fi. fa.* But the plaintiff in such action can recover nominal damages only, unless actual injury be proved.

Where, therefore, the sheriff delays selling for an unreasonable time, and before the sale, but after the time when he ought to have sold, receives notice of a fiat in bankruptcy against the execution debtor, and afterwards

returns that he has the levy money in his hands, but that he has received such notice, it lies upon the plaintiff to prove the trading, act of bankruptcy &c., so as to show that, by reason of the sheriff's delay, the right of property in the goods seized passed before the sale into other hands, and that the plaintiff's execution had been thereby frustrated. *Bales v. Wingfield*, 1833. 10 Bing. 831.

Whether a sheriff, who, in obedience to a *fi. fa.*, seizes the goods of a person who has committed an act of bankruptcy previously to issuing the execution, is liable in trover by the assignees of the latter, *quære*. *Garland v. Carlisle*, 1833. 3 Tyrw. 705; S. C. 2 Crompt. & Mee. 81.

In replevin the defendant avowed for rent in arrear, from one *J. M.*, and also claimed the goods as being the property of himself and another, as assignees of *J. M.*, against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record, the Court decided it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Semble*, that pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant, founded on his demand for rent. *Emery v.*

Mucklow, 1834. 4 Moore & Sco. 263; S. C. 10 Bing. 401.

ACTION AT LAW.

Where a creditor has a clear legal set-off in an action brought against him by the assignees, the Court will order the action to be stayed, and refer it to the Commissioners to take the account and state the balance. *Ex parte Glegg, re Douglas*, 1833. 3 Dea. & Ch. 505; S. C. 1 M. & A. 91.

Where a bankrupt, after commencing two actions against the petitioning creditor, and the messenger presents a petition to supersede, the Court will require him to discontinue the actions before it proceeds to hear the petition. But see next case. *Ex parte Pownall*, 1834. 3 Dea. & Ch. 723; S. C. 1 M. & A. 116, 314.

Where a bankrupt petitions to annul the fiat, on the ground of there being no petitioning creditor's debt, nor any act of bankruptcy, the Court cannot compel him to undertake not to bring an action. But see the preceding case. *Ex parte Daly*, 1834. 3 Dea. & Ch. 723; S. C. 1 M. & A. 343.

Plaintiff being liable to defendant for the costs of a nonsuit, issued a fiat of bankruptcy against the defendant. The Court refused to stay defendant's proceedings in the action. *Eicke v. Nokes*, 1834. 1 Bing. New Cases, 69.

ADJOURNMENT OF EXAMINATION.

Where the last examination of the bankrupt has been adjourned *sine die*, the Court will not order the Commissioners to appoint a time, unless misconduct be charged against them, or the bankrupt can show serious injury will accrue. *Ex parte Perkins*, 1834. 1 Mont. & Ayr. 524.

The Court will supersede where all the creditors consent, and the bankrupt has paid 20s. in the pound, though his examination has been adjourned *sine die*. *Ex parte Gudge*, 1 Mont. & Ayr. 341.

ADJOURNMENT OF PETITION.

Where a respondent takes a formal objection to a petition for want of parties, and the petition is for that cause ordered to stand over, the costs of the day are in the discretion of the Court. *Ex parte Thompson, re Ecroyd*, 1834. 3 Dea. & Ch. 612; S. C. 1 M. & A. 312, 324.

ADJUDICATION.

Where there are not the requisites to support a fiat, the Chancellor will recommend to the Commissioner to hear counsel against the adjudication; and if the bankruptcy be already found, will stay the insertion of the advertisement in the Gazette, and supersede. *Ex parte Nokes*, 1834. 1 Mont. & Ayr. 461.

ADMINISTRATORS.

Where an administrator, being

under terms to plead issuably, pleads inconsistent pleas, *e. g.* plene administravit and his bankruptcy, the plaintiff may sign judgment for want of a plea. *Serle v. Bradshaw*, 1833. 4 Tyrw. 69.

ADVERSE POSSESSION.

The bankrupt act, 6 Geo. 4. c. 16. s. 72. vests in the assignees such goods, whereof the bankrupt was reputed owner at the time when he became bankrupt, by the consent and permission of the true owner. But where the true owner had permitted his goods to remain in the order and disposition of *A.* until the day before he became bankrupt, and then demanded the possession of them, which *A.* refused to deliver:—Held, that they did not pass to *A.*'s assignees. *Smith v. Topping*, 5 Barn. & Adol. 674; *S. C.* 2 Nev. & Man. 421.

ADVERTISEMENT.

Staying.

An application by the bankrupt to stay the advertisement in the Gazette, on his own affidavit, merely denying the existence of the petitioning creditor's debt or the committal of any act of bankruptcy, without any allegation of his solvency, will not be entertained unless the proceedings are produced for the inspection of the Court. *Ex parte Pownall*, 1834. 3 Dea. & Ch. 723; *S. C.* 1 M. & A. 314.

Where there are not the requisites to support a fiat, the Chancellor will recommend to the Commissioner

to hear counsel against the adjudication; and if the bankruptcy be already found, will stay the insertion of the advertisement in the Gazette, and supersede. *Ex parte Nokes*, 1834. 1 Mont. & Ayr. 461.

The Court of Review will stay the insertion of the advertisement in the Gazette. *Ex parte Lavender*, 1834. 1 Mont. & Ayr. 699.

AFFIDAVIT.

On a petition by creditors to supersede, on the ground of fraudulent collusion between the petitioning creditor and the bankrupt; the bankrupt's affidavit detailing the particulars of the fraud is admissible in evidence. *Ex parte Arnsby*, 1833. 3 Dea. & Ch. 10.

An affidavit, after being filed, cannot be withdrawn, so as to prevent the other side from making use of it, on the hearing of the petition. *Ex parte Labrey*, 1833. 3 Dea. & Ch. 232.

Where an affidavit is reported to be scandalous, the agent in London, who files the affidavit, is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Ex parte Wake*, 1833. 3 Dea. & Ch. 246.

It is an objection to the hearing of a petition, that the affidavits in support of it were sworn before the petition was presented; but the Court will sometimes discountenance such an objection, by allowing the petitioner to reswear his affidavits, and ordering

the petition to stand over for that purpose, and also by refusing the costs of the day to the respondent. *Ex parte Brown, re Lloyd*, 1833. 3 Dea. & Ch. 496.

When a petition is dismissed with costs, the Court will not limit the payment of costs merely as to the affidavits that were read on the hearing of the petition, for in general all affidavits filed are entered as read. *Ex parte Lucas, re Oldham*, 1834. 3 Dea. & Ch. 664; S. C. 1 M. & A. 405.

What is required to be stated in an affidavit on an application to enlarge the time for opening a fiat. *Ex parte Smith, re James*, 1834. 3 Dea. & Ch. 761; S. C. 1 M. & A. 473.

A bankrupt having been committed by one of the London Commissioners to the custody of the messenger, for not answering satisfactorily, was brought up before two Commissioners, and committed by them to Newgate:—Held, that the commitment was illegal, inasmuch as the bankrupt ought to have been brought up and re-examined before a Subdivision Court, consisting of three Commissioners, who must be all present at such re-examination, though they need not be unanimous in the sentence of commitment. And that on an application for the bankrupt's discharge by habeas corpus, an affidavit may be read, stating circumstances, which are not set forth in the warrant of the Commissioners. *Ex parte Lam-*

pon, 1834. 3 Dea. & Chit. 751; S. C. 1 M. & A. 245.

If an order of committal be asked, the affidavit must state that the money is still due and owing, and that the party has not paid, nor any person on his behalf; but the same strictness is not required on an intermediate order. *Ex parte Murray, re Smith*, 1834. 1 M. & A. 478.

Solicitor allowed to take affidavits off the file to attend action therewith, undertaking to return them in the same state. *Ex parte Whaley*, 1834. 1 Mont. & Ayr. 634.

AGENT.

See also PRINCIPAL AND AGENT.

Under a fiat against a banker, one person allowed to prove on behalf of a large number of holders of 1l. notes, not interfering as to the assignee or the certificate. *Ex parte Gordon, re Maberly*, 1834. 1 Mont. & Ayr. 282.

A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign government. The bills were not paid, process of insolvency issued against the foreign firm, and a commission against the English partner:—Held, the agent may prove under the commission, but will be restrained from receiving dividends unless he elect not to prove under the insolvency abroad. *Mattos v. Vazeller*, 1834. 1 Mont. & Ayr. 345, affirming *Ex parte*

Colesworth, 1 D. & C. 281. S. C. Mont. & B. 92.

M. and the Scotch bank mutually exchanged their notes at stated times. *M.* became bankrupt, his agent *B.* having notes of the Scotch bank in his hands. The assignees subsequently allowed *B.* to retain these notes in account with them, he having claims against *M.*:—Held, the Scotch bank could recover these notes against the assignees. *Ex parte The National Bank of Scotland, re Maberly*, 1834. 1 Mont. & Ayr. 644.

A custom of exchanging acceptances existed between the bankrupt and the other houses through the agency of *B.*; notes were sent by the petitioner to *B.*, but never exchanged, as bankruptcy intervened, and they were stolen from *B.*, and never formed any item in any settlement of accounts between *B.* and the assignees:—Held, that the petitioner could not recover the value of the notes from the assignees. *Ex parte Watson, re Maberly*, 1834. 1 Mont. & Ayr. 685.

AGREEMENT FOR LEASE.

Where a landlord agrees to grant a lease to *A.*, his executors, administrators, and assigns, upon certain conditions, and *A.* assigns his interest in the contract to *B.*, and then becomes bankrupt, *B.*, on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy;

and his right is not affected by a proviso, that in case of the bankruptcy of *A.*, the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of *A.*'s estate. *Morgan v. Rhodes*, 1834. 1 Mylne & Keen, 435.

An agreement for a lease is not annulled by the bankruptcy of the intended lessee. S. C. 1 Mont. & Ayr. 214.

An agreement for a lease is not annulled by the insolvency of the intended lessor. *Crosby v. Tooke*, 1833. 1 Mont. & Ayr. 215, n.

ALLOWANCE TO OFFICIAL ASSIGNEE.

See also BANKRUPT'S ALLOWANCE.

The Court of Review has jurisdiction to entertain a petition against the allowance made by the Commissioner to the official assignee. But the Court will not review the decision of the Commissioners as to the quantum of the allowance, unless it appears that he has proceeded on an erroneous principle. [Dissent. Sir J. Cross.] *Ex parte Tiplady, re Dickenson*, 1834. 3 Dea. & Chit. 570. S. C. 1 M. & A. 161.

AMENDMENT.

See also PETITION, AMENDMENT OF.

A party is not estopped from amending his deposition of proof, by making a second deposition contradictory to the first: the only ques-

tion is, which is the most worthy of credit. *Ex parte Britten*, 1883. 3 Dea. & Chit. 35.

Docket papers and the fiat cannot be amended by inserting the bankrupt's place of business. *Quære*. If the docket be correct, and the fiat incorrect through the error of the office. *Ex parte Graves, re Wyatt*, 1834. 1 Mont. & Ayr. 315.

ANNULLING FIAT.

See also SUPERSEDEAS—PETITION TO ANNUL—PETITION TO SUPERSEDE.

Where a creditor petitioned to annul the fiat on the ground of the misdescription of the bankrupt, without any intention on his part to issue another fiat, and the misdescription was so slight that no creditor was deceived by it, the Court dismissed the petition. *Ex parte Mills, re Colman*, 1834. 3 Dea. & Chit. 606. S. C. 1 M. & A. 310.

APPEAL TO LORD CHANCELLOR.

See also SPECIAL CASE.

Where a party obtains an order of the Lord Chancellor to hear an appeal on petition, instead of on special case, and the order is improperly obtained, the respondent must move to set it aside, and not wait to make his objection to the form of proceeding until the petition is called on for hearing.

Whether the matter appealed against be one of law or fact, the

Lord Chancellor will not determine before he hears the petition through. *Ex parte Keys*, 1834. 3 Dea. & Chit. 263. S. C. 1 Mont. & Ayr. 226.

On an appeal from the Court of Review on a special case, the Chancellor will not at the hearing permit the appellant to present a petition for liberty to proceed "otherwise" for the purpose of rectifying an error in the settlement of the special case. The determination of the judge is final as to the settlement of it. *Ex parte Low, re Hobson*, 1834. 1 Mont. & Ayr. 189.

APPEAL FROM COMMISSIONERS.

On an appeal in bankruptcy the appellant's counsel are entitled to open the case. *Ex parte Belcher*, 1833. 3 Dea. & Chit. 87.

The bankrupt, who was a tavern keeper, had bought of the petitioners large quantities of wines lying in the docks, which were sold to him by sample for stipulated prices and at long credit, and for which the petitioners delivered to him the usual transfer warrants. The assignees sold the wines by auction at a considerable loss, in consequence of which the Commissioner made a reduction in the petitioner's proof, on the ground that the prices charged for the wines were too high:—Held, that he was not justified in making such reduction. The costs of the petitioner, under these circumstances, were ordered to be paid out of the

estate. *Ex parte Reay*, 1833. 3 Dea. & Chit. 175.

A creditor tenders a proof for 3500*l.*, which the Commissioners reject *in toto*, and after presenting a petition against their decision, an order is made by consent that he shall prove for 500*l.* The Court would not grant him costs out of the estate, but ordered each party to pay his own costs. *Ex parte Waterhouse*, 1833. 3 Dea. & Chit. 108.

Where sums of money advanced, and to be advanced, are secured by deed, and any of the dealings then contemplated by the parties are tainted with usury, the deed is wholly invalid as a security, although the legal debt is not impeached. *A.* employs *B.* as a calico printer, and before the accounts for printing become due, from time to time advances him various sums of money, charging him, besides interest, with 1*l.* 10*s.* per cent. as a trade premium, which it was customary for persons in the same trade to take under like circumstances. *A.* was also in the habit of paying debts owing by *B.* to other persons before they became due, when *A.* deducted the usual discount, but charged *B.* with the full amount, besides interest and the trade premium above mentioned:—*Semble*, that both these modes of dealing were usurious; they were however, at best, of so suspicious a nature, that the Court declined to make an order for the sale of the property under the deed, but di-

rected an action of ejectment to be brought by *A.* against the assignees.

A. having succeeded upon the trial, applied for the costs of the petition, which the Court, under these circumstances, declined to grant, the petition being against the judgment of the Commissioner. *Ex parte Millington*, 1833. 3 Dea. & Chit. 298. *S. P.* and *S. C.* 1 Mont. & Ayr. 114.

Where a party petitions against the decision of the Commissioners, and an action is directed to be brought, the result of which is in his favour, he is not entitled to the costs of the petition, but only to the costs of the action. *Ex parte Millington*, 1833. 3 Dea. & Chit. 307. *S. P.* and *S. C.* 1 Mont. & Ayr. 114.

Where, after the rejecting of a proof by the Commissioners, the creditor on petition succeeds in establishing his debt by the affidavit of witnesses who were not tendered to the Commissioners for examination, he pays his own costs. *Ex parte Price*, 3 Dea. & Chit. 489. *S. C.* 1 Mont. & Ayr. 51.

The Court of Review has jurisdiction to entertain a petition against the allowance made by the Commissioners to the official assignee. But the Court will not review the decision of the Commissioner as to quantum of the allowance, unless it appears that he has proceeded on an erroneous principle. [Dissent. Sir *J. Cross.*] *Ex parte Tiplady, re Dickenson*, 1834. 3 Dea. & Chit. 570. *S. C.* 1 M. & A. 161.

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The rule of not allowing costs to a party appealing against the judgment of the Commissioners, will be relaxed in favour of a petitioner establishing a clear and indisputable right of proof, which the Commissioners had rejected. *Ex parte Hooper, re West*, 1834. 3 Dea. & Chit. 655.

Quære. Can the Court of Review entertain a petition of appeal from the rejection by the Commissioner of a proof of debt on a question of fact?

An objection that the Court of Review has no jurisdiction, cannot be taken on appeal, if not taken below. *Ex parte Turner, re Mackenzie*, 1834. 1 M. & Ayr. 357.

The Court can reverse the decision of a Subdivision Court on a matter of fact as to expunging a proof, that not being within 1 & 2 Will. 4. c. 56. s. 30. *Ex parte Baldwin, re Smith*, 1834. 1 Mont. & Ayr. 615.

APPEARANCE.

A formal objection to a notice of motion, is waived by the party appearing and requesting further time to oppose it. *Ex parte Morland*, 1833. 3 Dea. & Chit. 248.

The respondent not appearing when a petition was called on for hearing, the petitioner took such order as he could abide by. The Court refused the application of the respondent on a subsequent day, to restore the petition to the paper, where the only

cause assigned for the respondent's non-appearance was, that his agent had overlooked the entry of the petition on the former occasion. *Re Wilks*, 1833. 3 Dea. & Chit. 338.

APPRENTICE.

J. apprenticed his son to the bankrupt, two years before his bankruptcy, and agreed to pay a premium of 200*l.* *J.* was in partnership with *T.*, and the bankrupt owed them a joint debt exceeding the amount of the apprentice fee due from *J.* to the bankrupt. *J.* cannot set off the apprentice fee against the joint debt due from the bankrupt to *J.* and *T.* The Court, under these circumstances, ordered 100*l.* to be paid by *J.* to the assignees, together with the costs of the petition. *Ex parte Soames*, 1833. 3 Dea. & Chit. 320.

APPROPRIATION, SPECIFIC.

A. procures goods which he agrees with *B.* and *C.* shall be shipped on the joint adventure of the three, and then draws bills on *B.* and *C.* for the amount of the cost of the goods, which they accept, *A.* engaging to renew the bills until the return proceeds for the goods are received. *B.* and *C.* manage the shipment, and direct the consignee to forward the amount of the return sales to themselves. *A.* then applies to *D.* to discount two of those bills, and, to induce him to do so, undertakes that the proceeds of the goods shall be applied in liquidation of the bills; which undertaking, *D.*

after discounting the bills, communicates to *B.* and *C.* All the parties became bankrupt, and part of the return proceeds come to the hands of the assignee of *B.* and *C.*:—Held, that the proceeds were clothed with a trust for the payment of the bills, and that the assignees of *B.* and *C.* were bound to pay over such proceeds to the assignees of *D.* *Ex parte Copeland*, 1833. 3 Dea. & Chit. 199. *S. P.* *Ex parte Prescott*, *id.* 218. *S. C.* 1 Mont. & Ayr. 316.

A. supplies goods at his own cost to *B.* and *C.*, which it is agreed shall be shipped on the joint account of the three; and that *A.* shall draw bills on *B.* and *C.* on account of the return proceeds, he undertaking to renew the bills until funds come round so as to keep *B.* and *C.* out of cash advances. *B.* and *C.* accept the bills and consign the goods to their correspondents abroad, with directions to transmit the account of sales and the proceeds to themselves. *A.* discounts the bills with parties who have no knowledge of the bills being drawn on account of the joint shipment, and are not made acquainted with that circumstance until after the respective bankruptcies of *A.* and of *B.* and *C.*:—Held, that the bill-holders have nevertheless a lien on the return proceeds of the shipment which came to the hands of the assignees of *B.* and *C.*, subsequently to their bankruptcy. [Sir *J. Cross*, *dub.*] *Ex parte Prescott*, 1834. 3 Dea. & Chit. 218. *S. C.* 1 Mont. & Ayr. 316.

The bankrupt being indebted to the petitioners as the acceptor of two bills of exchange, entered into an agreement with them and *W. L.* that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of *W. L.* for sale: Held, that the petitioners might claim as equitable mortgagees, but subject to the prior lien of *W. L.* *Ex parte Greenhill*, 1833. 3 Dea. & Chit. 334.

ASSIGNEES.

Generally.

After an order for sale obtained by an equitable mortgagee, if the assignees delay the sale, *semble*, that the course is not to present a fresh petition for a sale, but to prosecute the former order. *Ex parte Robinson*, 1833. 3 Dea. & Chit. 103.

The Court will not interfere, on the application of the assignees to sanction an arrangement made by them for the satisfaction of a claim of the bankrupt's wife. The assignees must use their own discretion. *Ex parte James*, 1833. 3 Dea. & Chit. 290.

Under what circumstances a reserved bidding reserved to assignees, on the sale of property under an equitable mortgagee. *Ex parte Bernard*, 1833. 3 Dea. & Chit. 291. *S. C.* 1 M. & A. 81.

A reserved bidding allowed to assignees, on the sale of an estate which had been mortgaged by the bankrupt. *Ex parte Ellis*, 1833. 3 Dea. & Chit. 297.

A. in France employs *B.* to sell wines on commission, as well as to purchase other wines on his account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold by *B.* in his own name; part of the wines consigned by *A.* were in the dock warehouses standing in *B.*'s name, and part formed one indiscriminate stock in *B.*'s cellar. *A.* closes the connection with *B.*, and requires him to deliver up all the wines, but *B.* neglects to comply with this requisition, and shortly afterwards becomes bankrupt: Held, that the Court had jurisdiction to order the assignees of *B.* to deliver up these wines to *A.* *Ex parte Moldaut*, 1833. 3 Dea. & Chit. 351.

An assignee is entitled to his travelling expenses incurred by him subsequent to the choice of assignees. *Ex parte Lovegrove, re Cooper*, 1834. 8 Dea. & Chit. 763.

Where nearly six years had elapsed since the solicitor's bills of costs had been taxed by the Commissioners, and the assignee was a party to that taxation, and to the subsequent payments in discharge of the bills, the Court refused, on his application, to refer them for re-taxation. *Ex parte Hutchinson, re Freeman*, 1834. 3 Dea. & Chit. 829.

If the sole assignee be a creditor, and sign the consent to a supersedeas, he need not be served with the petition. *Ex parte Ramsay*, 1834. 1 Mont. & Ayr. 708.

The Court will not lend its sanction to a compromise of a suit by the assignees, though the Master reports it would be for the benefit of all parties. *Ex parte Williams, re Weinholt*, 1834. 1 Mont. & Ayr. 689.

Quære. Whether the Court has jurisdiction over the executor of an assignee? *Ex parte Turvill, re Miller*, 1834. 1 Mont. & Ayr. 686.

Creditors may petition to tax the solicitor's bill though paid, the assignees having been guilty of dereliction of duty in not filing the bills with the proceedings. *Ex parte Castle, re Payne*, 1834. 1 Mont. & Ayr. 665.

If a bill in equity by assignees be dismissed with costs, they must apply to the Commissioner, in the first instance, to allow them out of the estate. *Ex parte Gibson, re Phillips*, 1834. 1 Mont. & Ayr. 479.

In a suit by the assignees of a bankrupt's or insolvent's estate, it is not competent to the defendant to object that the suit has been instituted without the consent of the major part in value of the creditors, as required by the Bankrupt or Insolvent Debtors' Acts. The judgment in such a suit will bind the creditors, but the assignees took upon themselves the responsibility that the suit has been properly instituted and properly conducted. *Ex parte Piercy, re Roberts*, 1832. 1 Mylne & Keen, 4.

The consent of the creditors of a bankrupt to the institution of a suit by his assignees, though filed amongst the proceedings in the bankruptcy, must be proved. *Smith v. Biggs*, 1832. 5 Sim. 391.

Sed quare. See *Ex parte Evans*, 3 Dea. & Chit. 470. *Jones v. Yates*, 3 Y. & J. 373. *Piercy v. Roberts*, 1 Myl. & K. 4.

In 1810 *A.* conveys Blackacre to *B.*, *B.* becomes bankrupt, and his assignee conveys, in 1823, to *C.* In 1824 *A.* conveys Blackacre to *D.* It is competent to *D.*, in an ejectment brought against him by *C.*, to shew that in 1818 *A.* had no legal estate in Blackacre. Whether a conveyance by assignees of a bankrupt, where neither bankrupt nor assignees have been in possession within a year, amounts to embracery. *Quare.* *Doe v. Powell*, 1834. 3 Nev. & Man. 616.

Choice of.

Assignees are not removeable merely because Commissioners reject the proofs of creditors, who would have been entitled to vote in the choice of assignees, if they had been permitted to prove their debts; unless, indeed, their proofs are fraudulently procured to be rejected. *Ex parte Milner*, 1833. 3 Dea. & Chit. 235.

Upon a new choice of assignees there is no necessity to vacate the assignment under a commission issued prior to 1 & 2 Will. 4, c. 56. *Smith*

v. De Tastet, 1834. 1 Mont. & Ayr. 370.

After the choice of assignees the Court will not make any order as to the bankrupt's allowance for maintenance. *Ex parte Hall*, 1834. 1 Mont. & Ayr. 450.

Liability of.

One of the assignees, having the sole charge of paying the dividends, pays the dividend of a creditor to a person who is not duly authorized to receive it. The two other assignees are equally responsible to the creditor for the amount of the dividend. *Ex parte Winnall*, 1838. 3 Dea. & Chit. 22.

A., before his bankruptcy, agrees to take a lease of a cotton mill, and enters into possession. After his bankruptcy one of his assignees takes possession, and agrees to accept the lease, a draft of which was sent to the assignees, containing covenants personally binding on them during the whole of the term; and one in particular, to prevent them from assigning without the licence of the lessor:—Held, that the assignees were not bound to accept of such a lease, and even if they were, that the Court of Review had no jurisdiction to compel a specific performance of the agreement. *Ex parte Lucas*, 1833. 3 Dea. & Chit. 144. S. C. 1 Mont. & Ayr. 93.

Under the Bankruptcy Act, the bankrupt is not bound to pay the fee

for the signature of the Commissioner to his certificate, but the assignees, *come semble*, are now liable for the payment of it. *Re Dawson*, 1833. 3 Dea. & Chit. 317.

The assignees are accountable for any money they distribute among the creditors, without an order of dividend; and although the bankrupt does not obtain his certificate until after such distribution, yet when he does obtain it, he may petition for an order on the assignees to declare a final dividend to the amount of the sum distributed, with a view of claiming his allowance, and the Court make a proper order to prevent the bankrupt from being deprived of his allowance to the extent of the sum distributed. *Ex parte Lomas, re Cooke*, 1834. 3 Dea. & Chit. 681. S. C. 1 M. & A. 437.

A custom of exchanging acceptances existing between the bankrupt and other houses, through the agency of *B.*, notes were sent by the petitioner to *B.*, but never exchanged, as bankruptcy intervened, and they were stolen from *B.*, and never formed any item in any settlement of accounts between *B.* and the assignees:—Held, the petitioner could not recover the value of the notes from the assignees. *Ex parte Watson, re Maberly*, 1834. 1 Mont. & Ayr. 685.

M. and the Scotch bank mutually exchanged their notes at stated times. *M.* became bankrupt. His agent *B.* having notes of the Scotch

bank in his hands, the assignees subsequently allowed *B.* to retain these notes in account with them, he having claims against *M.*:—Held, the Scotch bank could recover these notes against the assignees. *Ex parte The National Bank of Scotland, re Maberley*, 1824. 1 Mont. & Ayr. 644.

If the assignees continue to defend a suit instituted against the bankrupt, which is decided in favour of the plaintiff with costs, and they have no assets, they are not personally liable, unless they vexatiously continued the defence. *Ex parte Gibson, re Phillips*, 1834. 1 Mont. & Ayr. 479.

In an action by a messenger to a commission of bankrupt against the assignee, appointed under 6 Geo. 4. c. 16, to recover the costs of advertising a meeting of creditors, and of hiring a room for them to assemble in, it is sufficient to prove the plaintiff's appointment, and that the expenses incurred by him were reasonable, without having express employment or recognition of him as messenger by the assignee. *Hamber v. Parser*, 1833. 4 Tyrw. 41. S. C. 2 Crompt. & Mees. 209.

Assumpsit. The first count stated that plaintiff had lawfully distrained for 350*l.*, due for rent on the effects of one *L.*, against whom a fiat had issued, and of whose estate defendant claimed to be assignee, and had put a person in possession thereof, and that in consideration

that plaintiff, at request of defendant, would withdraw the said person so put into possession, defendant claiming to be assignee as aforesaid, undertook that the said sum should be paid to the plaintiff out of the produce of the sale of the same effects. Averments, that plaintiff did withdraw the person from possession, and that defendant took possession; but though a reasonable time for sale of the effects and for such payments had elapsed, did not pay the said sum to the plaintiff. Plea, that before defendant's promise was made, a fiat in bankruptcy was issued against *L.*, under which *L.* was found a bankrupt, and defendant was appointed his assignee. That defendant was only interested as such assignee in procuring the distress to be withdrawn, and that after making the promises declared on, and before a reasonable time had elapsed for the sale of the effects in the declaration mentioned, the fiat was duly superseded, and the defendant was afterwards unable to sell the said effects and pay the plaintiff out of the produce, and gave notice to the plaintiff of such inability, whereby the defendant was discharged from performing the promises in the declaration:—Held, on demurrer, that the defendant's promise was unqualified, and that the plaintiff had relinquished his rights in consequence of it, and was entitled to recover.

Semble. The plea was bad for not disclosing that the defendant had

not sold before the fiat was superseded. *Stephens v. Pell*, 1833. 4 Tyrw. 6.

ASSIGNEES, PURCHASE BY.

An assignee, who was also a mortgagee of the bankrupt's freehold property, having purchased it for himself when it was put up for sale, the estate was ordered to be resold, subject to any claim of the assignee by virtue of his mortgage. *Ex parte Turvill*, 1833. 3 Dea. & Ch. 346.

Order refused for an assignee to bid for the bankrupt's property, although the assignee obtained the consent of a meeting of the creditors, such meeting having been only attended by half in value of the creditors. *Ex parte Beaumont, re Edmonston*, 1834. 3 Dea. & Ch. 549; S. C. 1 M. & A. 304.

The Court will not confirm a purchase of part of the bankrupt's estate made by an assignee without leave, because a meeting of creditors has consented. *Ex parte Thwaites, re Knowles*, 1834. 1 Mont. & Ayr. 323.

ASSIGNEES, REMOVAL OF.

Assignees are not removable merely because Commissioners improperly reject the proofs of creditors who would have been entitled to vote in the choice of assignees, if they had been permitted to prove their debts; unless, indeed, their proofs are fraudulently procured to be rejected. *Ex parte Milner*, 1833. 3 Dea. & Ch. 235.

The examination of the assignee

before the Commissioner, as to the sale of the property, was permitted to be read as evidence of the assignee's misconduct, the petition praying to discharge him for misconduct, although it did not pray a resale. *Ex parte Turvill*, 1833. 3 Dea. & Ch. 346.

Where a sole assignee was in insolvent circumstances, and there was some suspicion attached to the debts of the creditors who elected him, an order was made that he should be restrained from acting as assignee, and that one or more persons should be appointed to act in his name, giving him a proper indemnity. *Ex parte Copeland, re Weston*, 1834. 3 Dea. & Ch. 561; S. C. 1 M. & A. 305.

ASSIGNMENT OF EQUITABLE RIGHTS.

S. having advanced money to M. received from him, by way of security, an assignment of his equitable life interest in certain stock standing in the names of three trustees, under a marriage settlement, and in a mortgage vested in the same trustees. The solvency of M. becoming doubted, one of the trustees and a relation of S. spoke to him on the subject, when S. in the course of the conversation, and without any view of giving validity to the security he held, told him that he held the above-mentioned assignment as a security for his advances. M. having afterwards become bankrupt, Held, that this statement, though made to a person who

was not acting trustee, sufficed to prevent the stock and mortgage from being in the order and disposition of M. at the time of his bankruptcy, and consequently from passing to his assignees. *Smith v. Smith*, 1833. 4 Tyrw. 52; S. C. 2 Crompt. & Mees. 231.

Where shares of an insurance company are held in the name of the bankrupt as trustee, they are not in his reputed ownership. What is notice to the office? *Ex parte Watkins, re Kidder*, 1834. 1 Mont. & A. 689.

Where a landlord agrees to grant a lease to A., his executors, administrators, and assigns, upon certain conditions, and A. assigns his interest in the contract to B., and then becomes bankrupt, B., on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and his right is not affected by a proviso, that in case of the bankruptcy of A. the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of A.'s estate. *Morgan v. Rhodes*, 1834. 1 Mylne & Keen, 435.

Upon the assignment of a simple contract debt, the assignor must be considered as having the order and disposition of the debt, with the consent of the true owner, until the debtor has notice of the assignment. Such debt will, therefore, pass to the assignees under a bankruptcy, by

virtue of 6 Geo. 4. c. 16. s. 72., and to the assignees under the insolvent debtors' act, 7 Geo. 4. c. 57. s. 31. *Buck v. Lee*, 1834. 3 Nev. & Man. 580.

THE ASSIGNMENT.

What passes to the Assignees thereby.

A London banker having a branch bank at Edinburgh, stops payment on the 2d of January, and writes to his agent at Edinburgh, apprising him of the fact, and directing the business of the branch bank to be discontinued. On the 4th January, before this notice reaches the agent, the petitioner pays into the Edinburgh bank 305*l.* 15*s.* in notes and cash, to be remitted to the house in London; but after the news reaches Edinburgh, and whilst the notes were still in the agent's possession, gives him notice not to part with them, and they remained in his hands on the 26th January, when a fiat issued against the banker in London. The agent at Edinburgh having a lien on the funds in his hands, the assignees permitted him to retain the 305*l.* 15*s.* in part satisfaction of his lien:—Held, that the assignees were bound to refund this sum to the petitioners. *Ex parte Cunningham*, 1833. 3 Dea. & Ch. 58.

The same order made as in *Ex parte Cunningham*, *supra*, p. 58, although the notes delivered to the banker's agent were not identified. *Ex parte Solomons*, 1833. 3 Dea. & Ch. 77.

The same order was also made in this case. The notes in this case were paid in by the customer on the 3d January to a sub-agent of the banker at Glasgow, who remitted them on the 4th to the managing agent at Edinburgh. *Ex parte Wylie*, 1833. 3 Dea. & Chit. 82.

The order made in *Ex parte Cunningham*, p. 58, confirmed on appeal to the Lord Chancellor. *Ex parte Belcher*, 1833. 3 Dea. & Ch. 87.

A. procures goods, which he agrees with *B.* and *C.* shall be shipped on the joint adventure of the three, and then draws bills on *B.* and *C.* for the amount of the costs of the goods, which they accept, *A.* engaging to renew the bills until the return proceeds for the goods are received. *B.* and *C.* manage the shipment, and direct the consignee to forward the amount of the return sales to themselves. *A.* then applies to *D.* to discount two of these bills, and to induce him to do so, undertakes that the proceeds of the goods shall be applied in liquidation of the bills, which undertaking *D.*, after discounting the bills, communicates to *B.* and *C.* All the parties become bankrupt, and part of the return proceeds come to the hands of the assignees of *B.* and *C.*:—Held, that the proceeds were clothed with a trust for the payment of the bills, and that the assignees of *B.* and *C.* were bound to pay such proceeds to the assignees of *D.* *Ex parte Copeland*,

1833. 3 Dea. & Ch. 199. *S. P. Ex parte Prescott*, id. 218; *S. C.* 1 Mont. & A. 316.

A. supplies goods at his own cost to *B.* and *C.*, which it is agreed shall be shipped on the joint account of the three, and that *A.* shall draw bills on *B.* and *C.* on account of the return proceeds, he undertaking to renew the bills until funds come round so as to keep *B.* and *C.* out of cash advances. *B.* and *C.* accept the bills, and consign the goods to their correspondent abroad, with directions to transmit the account of sales and the proceeds to themselves. *A.* discounts the bills with parties who had no knowledge of the bills being drawn on account of the joint shipment, and are not made acquainted with that circumstance until after the respective bankruptcies of *A.* and of *B.* and *C.*:—Held, that the bill-holders have nevertheless a lien on the return proceeds of the shipment which came to the hands of the assignees of *B.* and *C.* subsequently to their bankruptcy. [Sir *J. Cross* dubit.] *Ex parte Prescott*, 1833. 3 Dea. & Ch. 218; *S. C.* 1 Mont. & Ayr. 316.

A., in France, employs *B.* in England to sell by commission, as well as to purchase other wines on *A.*'s account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold in *B.*'s name, part of the wines consigned by *A.* were in the dock warehouses, standing in *B.*'s name, and part formed the indiscri-

minate stock of *B.*'s cellar. *A.* closes the connection with *B.* and requires him to deliver up all the wines, but *B.* neglects to comply with the requisition, and shortly afterwards becomes bankrupt:—Held, that no order could be made for the payment to *A.* of any monies, the produce of the wines, if mixed with the other monies of *B.* at the time of his bankruptcy. *Ex parte Moldant*, 1833. 3 D. & C. 351.

By the 6 Geo. 4. c. 16. s. 127. it is provided, that if any person shall have been discharged by certificate, or shall have compounded with his creditors, or shall be discharged under any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce sufficient to pay his creditors 15*s.* in the pound, such certificate shall only protect his person from arrest, but his future estate shall vest in his assignees under the said commission:—Held, that the clause was retrospective, and that it applied to discharges by bankruptcy and insolvency before the passing of the act, as well as to discharges obtained subsequent to the passing of the act.

A., in the year 1815, was discharged under an insolvent act, and in 1830 obtained his certificate under a commission of bankruptcy issued in 1829, under which commission his estate produced less than sufficient to pay his creditors 15*s.* in the pound. *A.*, in the year 1832, opened an account with the Bank of England,

and a sum of 294*l.* 15*s.* was deposited by him in the bank:—Held, that an action for money had and received, brought by the assignees under the commission against the Governor and Company of the Bank of England, to recover the amount so deposited, was maintainable. *Elston v. Braddick*, 1834. 2 Crompt. & Mees. 435; S. C. 4 Tyrw. 122.

A quantity of hops was purchased from the defendants in April 1831, the invoice of which contained the words, “on rent.” The hops remained in the seller’s warehouse, and a bill accepted by the buyer was afterwards given them at their request, which they indorsed on getting it discounted. During the running of that bill, part of the hops was delivered, in pursuance of the buyer’s order, to his sub-purchaser, who paid the warehouse rent charged by the sellers. Afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonoured at maturity. Held, that though the sellers might not have a right, while the bill remained outstanding, to part with the hops remaining in their possession, the assignee of the original buyer could not maintain trover for them without actual payment of the price agreed on, as well as of the warehouse rent, he having only the right of property, without that of possession. *Miles v. Gorton*, 1834. 4 Tyrw. 295.

A steam engine erected for the purpose of working a colliery, to be

used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of “goods and chattels” in 6 Geo. 4. c. 16. s. 72. nor had the bankrupt the actual or apparent ownership. *Coombs v. Beaumont*, 1833. 5 Barn. & Adol. 72.

The Bankrupt Act, 6 Geo. 4. c. 16. s. 72. vests in the assignees such goods whereof the bankrupt was reputed owner at the time when he became bankrupt, by the consent and permission of the true owner. But where the true owner had permitted his goods to remain in the order and disposition of *A.* until the day before he became bankrupt, and then demanded the possession of them, which *A.* refused to deliver:—Held, that they did not pass to *A.*’s assignees. *Smith v. Tapping*, 1833. 5 Barn. & Adol. 674. S. C. 2 Nev. & Man. 421.

Vacating.

Upon a new choice of assignees there is no necessity to vacate the assignment under a commission issued prior to 1 & 2 Will. 4. c. 56. *Smith v. De Tastet*, 1834. 1 Mont. & Ayr. 370.

ASSIGNMENT

Of Petitioning Creditor’s Bond.

A fiat superseded, with costs to be paid by the petitioning creditor,

on the ground of the bankrupt's minority, but the Court made no order for assigning the bond. *Ex parte Hekir*, 1833. 3 Dea. & Chit. 107.

ASSIGNOR AND ASSIGNEE.

Where a landlord agrees to grant a lease to *A.*, his executors, administrators, and assigns, upon certain conditions, and *A.* assigns his interest in the contract to *B.*, and then becomes bankrupt, *B.*, on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and his right is not affected by a proviso, that in case of the bankruptcy of *A.* the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of *A.*'s estate. *Morgan v. Rhodes*, 1834. 1 Mylne & Keen, 435.

ATTORNEY.

See SOLICITOR.

ATTORNEY'S ADMISSION.

A party, under the special circumstances, admitted an attorney *nunc pro tunc*. *Ex parte Tanner*, 1833. 3 Dea. & Chit. 10.

The admission of a solicitor, under peculiar circumstances, ordered to be inrolled *nunc pro tunc*. *Ex parte Anon.* 1833. 3 Dea. & Chit. 417

BANKRUPTCY.

Its Effect.

One or two partners accept bills for a previous partnership liability, after the co-partner had committed an act of bankruptcy:—Held, that these bills were in the hands of a bonâ fide holder, proveable against the joint estate under a subsequent commission issued against both parties. *Ex parte Robinson*, 1833. 3 Dea. & Chit. 376. S. C. 1 Mont. & Ayr. 18.

Where a landlord agrees to grant a lease to *A.*, his executors, administrators, and assigns, upon certain conditions, and *A.* assigns his interest in the contract to *B.*, and then becomes bankrupt, *B.*, on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and this right is not affected by a proviso, that in case of the bankruptcy of *A.* the landlord shall have power to re-enter, and sell the benefit of the contract and premises, and hold the proceeds, subject to his own claims, for the use of *A.*'s estate. *Morgan v. Rhodes*, 1834. 1 Mylne & Keen, 435.

R. M. made a settlement of real estate to the use of himself for life, with a power to appoint to any one or more of his sons, in fee or otherwise, and, in default of appointment, to his first and other sons in tail, with remainder to himself in fee. He became bankrupt, and subse-

quently to his bankruptcy appointed to his eldest son in fee:—Held, that the appointment could not enure as an appointment to a base fee, determinable on the extinction of the prior estates tail, because such a limitation would have been bad in the settlement creating the power.

Quære. Whether the power was destroyed by the bankruptcy; the Court considering that the invalidity of the appointment rendered it unnecessary to determine that point. *Badham v. Mee*, 1832. 1 Mylne & Keen, 32.

BANKRUPT,

Generally.

On a petition by creditors to supersede, on the ground of fraudulent collusion between the petitioning creditor and the bankrupt, the bankrupt's affidavit detailing the particulars of the fraud is admissible in evidence. *Ex parte Arnsby*, 1833. 3 Dea. & Chit. 10.

When the bankrupt petitions to annul the fiat on the ground that he has not committed an act of bankruptcy, the Court will order him to be furnished with copies of the depositions relating to the act of bankruptcy. *Ex parte Smith*, 1833. 3 Dea. & Chit. 101.

A bankrupt did not disclose a life interest which he possessed in certain property, when he passed his last examination; and after a lapse of more than twenty years, when four of the Commissioners were dead, he petitioned for a fiat to be

issued to fresh Commissioners, and that the assignee might be ordered to account. The Court, under these circumstances, allowed the bankrupt to issue a new fiat in the name of a creditor, but thought that, after this concealment, he was not entitled to any inquiry against his assignee. *Ex parte Holder*, 1834. 3 Dea. & Chit. 276.

Under the Bankruptcy Court Act, the bankrupt is not bound to pay the fee for the signature of the Commissioner to his certificate, but the assignees, *come semble*, are now liable for the payment of it. *Re Dawson*, 1833. 3 Dea. & Chit. 317.

The price of goods sold by an uncertificated bankrupt may be recovered by him against the vendee, his assignees not interfering. *Hayllar v. Sherwood*, 1833. 1 Nev. & Man. 401.

Where a bankrupt, after commencing actions against the petitioning creditor and the messenger, presents a petition to supersede, the Court will require him to discontinue the actions before it proceeds to hear the petition. But see next case. *Ex parte Pownal*, 1834. 3 Dea. & Chit. 723. S. C. 1 M. & A. 163, 314.

Where a bankrupt petitions to annul the fiat, on the ground of there being no petitioning creditor's debt, nor any act of bankruptcy, the Court cannot compel him to undertake to bring an action: but see the preceding case. *Ex parte Daly*, 1834. 3

Dea. & Chit. 723. S. C. 1 M. & A. 343.

A bankrupt is protected from arrest, on an attachment for contempt for non-payment of money, on his return home from passing his last examination. *Ex parte Jeyes*, 1834. 3 Dea. & Chit. 764.

The Court has jurisdiction to restrain the bankrupt from bringing actions to upset his commission. After twenty-two years, and acquiescence, the Court will restrain the bankrupt from bringing actions against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 283.

The Court has jurisdiction to stay any action brought by bankrupt in any Court. *Ibid.* 290.

Long acquiescence is enough to refuse to supersede, on the application of the bankrupt, but not alone enough to enable the Court to restrain him from bringing actions. *Ibid.* 297.

The Court would not restrain an action in which the bankrupt intended fairly to try the validity of the commission. If bankrupt petition to supersede, having actions pending, he must elect. *Ibid.* 299.

Where there are not the requisites to support a fiat, the Chancellor will recommend to the Commissioner to hear counsel against the adjudication; and if the bankruptcy be already found, will stay the insertion of the advertisement in the Gazette,

and supersede. *Ex parte Nokes*, 1834. 1 Mont. & Ayr. 461.

His Allowance.

The assignees are accountable for any money they distribute among the creditors without an order or dividend. And although the bankrupt does not obtain his certificate until after such distribution, yet when he does obtain it, he may petition for an order on the assignees to declare a final dividend to the amount of the sum distributed, with a view to claiming his allowance. And the Court will make a proper order to prevent the bankrupt from being deprived of his allowance to the extent of the sum distributed. *Ex parte Lomas, re Cooke*, 1834. 3 Dea. & Chit. 681. S. C. 1 M. & A. 437.

After the choice of assignees, the Court will not make any order as to the bankrupt's allowance for maintenance. *Ex parte Hall*, 1834. 1 Mont. & Ayr. 450.

Under a joint and separate fiat, the bankrupt's allowance is to be calculated on the amount of his separate estate, together with his share of the joint estate, not on the gross amount of the joint estate. *Ex parte Lomas, re Cooke*, 1834. 1 Mont. & Ayr. 525.

His Examination adjourned sine die.

The Court will supersede where all the creditors consent, and the bankrupt has paid 20s. in the pound,

though his examination has been adjourned *sine die*. *Ex parte Gudge*. 1 Mont. & Ayr. 341.

Where the last examination of the bankrupt has been adjourned *sine die*, the Court will not order the Commissioners to appoint a time, unless misconduct be charged against them, or the bankrupt can show serious injury will accrue. *Ex parte Perkins*, 1834. 1 Mont. & Ayr. 524.

His Surrender.

A petition to supersede a joint commission, on consent of creditors, cannot be entertained as to any one of the bankrupts who has not surrendered. *Ex parte Knowlson*, 1833. 3 Dea. & Chit. 191.

A surrender at a prior meeting is sufficient where the bankrupt becomes unable by illness to surrender at the last meeting. *Ex parte Thomas*, 1833. 3 Dea. & Chit. 234.

A trader being in debt to several persons, leaves the country in June 1833 with some intention of returning, but does not actually return, nor does he make provision for the payment of all his debts. In September 1833, one of the creditors, whose debt was left unprovided for, issues a fiat against him, which the bankrupt, by his agent in this country, after the forty-second day, petitions to supersede:—Held, (dissent. Sir J. Cross) that the fiat could not be superseded without the previous surrender of the bankrupt:—Held also, *per tot. Cur.*, that the continued absence of the

bankrupt, under these circumstances, amounted to an act of bankruptcy. *Ex parte Kirkman*, 1833. 3 Dea. & Chit. 450. S. C. 1 Mont. & Ayr. 709.

BANKRUPT EXECUTOR.

It seems that a sole executor who becomes bankrupt may sign his own certificate. *Re Lawrence*, 1834. 1 Mont. & Ayr. 453.

BARGAIN AND SALE.

The common bargain and sale from the Commissioners to the assignees passes an estate tail of which the bankrupt was seised at the time of his bankruptcy.

Quære, therefore, where the bankrupt was seised of an estate tail, which he represented as an estate in fee simple, and died before the estate was sold under his commission, whether there is any necessity for the Commissioners executing a special conveyance to the purchaser, and what would be the effect of such a conveyance thus executed after the death of the bankrupt? *Ex parte Somerville, re Loscombe*, 1834. 3 Dea. & Chit. 668. S. C. 1 Mont. & Ayr. 408.

BARRISTER.

See also COUNSEL.

The Court will in all cases uphold the general order of Lord Loughborough, which directs that in country commissions there must be inserted the names of two barristers. *Ex parte Kilsby*, 1833. 3 Dea. & Chit. 19.

BOND.

See also ASSIGNMENT OF PETITIONING CREDITOR'S BOND.

A bankrupt had on his marriage entered into a bond to trustees to pay them 1200*l.* upon trust for himself for life, if he should not become a bankrupt, with remainder to his intended wife for life, with the usual limitations to children; and on the faith of the bond he was permitted to apply to his own use his wife's marriage portion, amounting to 150*l.*: Held, that the trustees were entitled to prove for the 1200*l.*; the dividends to be invested in stock, the dividend of which was to be subject to the payment of interest to the wife on the 150*l.*, and the remainder to the bankrupt's creditors for his life, and after his death, upon the trusts of the bond. *Ex parte Shute*, 1833. 8 Dea. & Chit. 1.

R. C. borrowed a sum of money, and gave the lenders a bond, by which he and four others bound themselves jointly and severally in a penalty for the regular payment of interest, and for the discharge of the principal and all interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of *R. C.* became bankrupt, and obtained his certificate. At the time of the bankruptcy a forfeiture had accrued by non-payment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certi-

ficate, *R. C.* was called upon for the principal, but did not pay, and payment was enforced from the four co-obligors who had continued solvent. In an action by one of them against the party who had been bankrupt, for contribution:—Held, that they could not have proved under the commission by sect. 52 of the Bankrupt Act, and therefore that the certificate was no answer to the action. *Clements v. Langley*, 1833. 5 Barn. & Adol. 372.

BILLS OF EXCHANGE.

See also ACCOMMODATION BILLS—
CROSS BILLS.

H., a money broker, was in the habit of depositing bills of exchange with *B. and Co.* as a security for advances, but he did not indorse the bills, nor were they negotiated by *B. and Co.*, or ever presented for payment. Amongst the bills so deposited was one for 1000*l.* accepted by *C.*, who became bankrupt on the 5th March 1824, which was some time after the bill fell due. *H.* also became bankrupt on the 12th December 1825, when *B. and Co.* proved the amount of the balance he owed them, excepting this bill as a security; but made no attempt to prove the bill under *C.*'s commission until January 1826, when the Commissioners rejected the proof:—Held, that the delivery of the bill by *H.* to *B. and Co.* must be taken to have been by way of pledge, to secure the amount of the advances then due from *H.* to *B. and*

Co., and not with an intention to transfer the property in it; and that the amount of those advances having been since paid, B. and Co. could not, under these circumstances, prove the bill under C.'s commission. *Ex parte Britten*, 1833. 3 Dea. & Chit. 35.

A. procures goods, which he agrees with B. and C. shall be shipped on the joint adventure of the three, and then draws bills on B. and C. for the amount of the costs of the goods, which they accept, A. engaging to renew the bills until the return proceeds for the goods are received. B. and C. manage the shipment, and direct the consignee to forward the account of the return sales to themselves. A. then applies to D. to discount two of these bills, and, to induce him to do so, undertakes that the proceeds of the goods shall be applied in liquidation of the bills; which undertaking D., after discounting the bills, communicated to B. and C. All the parties became bankrupt, and part of the return proceeds came to the hands of the assignee of B. and C.:—Held, that the proceeds were clothed with a trust for the payment of the bills, and that the assignees of B. and C. were bound to pay over such proceeds to the assignees of D. *Ex parte Copeland*, 1833. 3 Dea. & Chit. 199. S. P. *Ex parte Prescott*, *id.* 218. S. C. 1 Mont. & Ayr. 316.

A. supplies goods at his own cost to B. and C., which it is agreed

shall be shipped on the joint account of the three, and that A. shall draw bills on B. and C. on account of the return proceeds, he undertaking to renew the bills until funds came round so as to keep B. and C. out of cash advances. B. and C. accept the bills, and consign the goods to their correspondent abroad, with directions to transmit the account of sales and the proceeds to themselves. A. discounts the bills with parties who have no knowledge of the bills being drawn on account of the joint shipment, and are not made acquainted with that circumstance until after the respective bankruptcies of A. and of B. and C.:—Held, that the bill-holders have nevertheless a lien on the return proceeds of the shipment which come to the hands of the assignees of A., B., and C., subsequently to their bankruptcy. [Sir J. Cross dubit.] *Ex parte Prescott*, 1834. 3 Dea. & Chit. 218. S. C. 1 Mont. & Ayr. 316.

The holder of a bill of exchange falling due and being dishonoured after the bankruptcy of the drawer, is bound to use due diligence in giving notice to the bankrupt or his assignees of the dishonour of the bill. Therefore, where the bankrupt's house continued open in his absence after his bankruptcy, the messenger being in possession during part of the time, and the bankrupt's wife or clerk, during the other period of his absence:—Held, that the holder was at least bound to leave notice at the bankrupt's house.

Quære, whether he was bound also to seek out the bankrupt's assignees, for the purpose of giving them notice? No such notice however is necessary, where there are no effects of the drawer in the hands of the acceptor during the currency of the bill. *Ex parte Johnson*, 1834. 3 Dea. & Chit. 433; S. C. 1 Mont. & Ayr. 622.

BILL.

Dismissal of.

If a bill filed by assignees be dismissed with costs, the Lord Chancellor has no jurisdiction to order the costs to be retained out of the bankrupt's estate. *Turner v. Hibbert*, 1834. 1 Mont. & Ayr. 243. But see *Ex parte Keys*, 3 Dea. & Chit. 263. S. C. 1 Mont. & Ayr. 226.

If a bill in equity by assignees be dismissed with costs, they must apply to the Commissioner, in the first instance, to allow them out of the estate. *Ex parte Gibson, re Phillips*, 1834. 1 Mont. & Ayr. 479.

CERTIFICATE OF BANKRUPT.

Allowance and Signature of.

Where two bankrupts, under a joint fiat, obtain a joint certificate from their creditors, and one of the bankrupts dies before the certificate is allowed, the Court will on motion allow it as the separate certificate of the survivor. *Ex parte Carter*, 1834. 3 Dea. & Ch. 549; S. C. 1 M. & A. 115.

It seems that a sole executor, who becomes bankrupt, may sign his own certificate. *Re Lawrence*, 1834. 1 M. & A. 453.

Semble, that a creditor who had signed the certificate by attorney cannot stop the certificate by subsequently withholding an affidavit verifying his signature to the power. *Ex parte Dunstan*, 1834. 1 M. & A. 619.

Effect of, and of the want of.

The assignees are accountable for any money they distribute among the creditors without an order of dividend. And although the bankrupt does not obtain his certificate until after such distribution, yet when he does obtain it, he may petition for an order on the assignees to declare a final dividend to the amount of the sum distributed, with a view of claiming his allowance. And the Court will make a proper order to prevent the bankrupt from being deprived of his allowance to the extent of the sum distributed. *Ex parte Lomas, re Cooke*, 1834. 3 Dea. & Ch. 681; S. C. 1 M. & A. 417.

The price of goods sold by an uncertificated bankrupt may be recovered by him against the vendee, his assignees not interfering. *Haylar v. Sherwood*, 1833. 1 Nev. & Man. 401.

It is not of course to supersede a second commission against an uncertificated bankrupt, on the application of

the assignees &c. under the fiat. *Ex parte Devas, re Kenton*, 1834. 1 M. & A. 420.

By the 6 Geo. 4. c. 16. s. 127., it is provided, that if any person shall have been discharged by certificate, or shall have compounded with his creditors, or who shall be discharged under any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce sufficient to pay his creditors 15s. in the pound, such certificate shall only protect his person from arrest, but his future estate vests in his assignees under the said commission:—Held, that the clause was retrospective, and that it applied to discharges by bankruptcy or insolvency before the passing of the act, as well as to discharges obtained subsequent to the passing of the act. *A.*, in the year 1815, was discharged under an insolvent act, and in 1830 obtained his certificate under a commission of bankrupt issued in 1829, under which commission his estate produced less than sufficient to pay 15s. in the pound. *A.*, in the year 1832, opened an account with the Bank of England, and a sum of 294l. 15s. was deposited by him in the bank:—Held, that an action for money had and received, brought by the assignees under the commission against the Governor and Company of the Bank of England, to recover the amount so deposited, was maintainable. *Elston v. Braddick*, 1834.

2 Crompt. & Mess. 435; S. C. 4 Tyrw. 122.

Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate. But if the attorney committed fraud in the receiving, and not accounting, the Court, in the exercise of its general jurisdiction over its officers, will enforce such payment as a modification of the punishment which it might otherwise inflict for his misconduct. The case of fraud, however, ought to be clear, and the attorney should have notice, by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to show cause why he should not pay over the money. *Re Bonner*, 1833. 4 Barn. & Adol. 811.

After the bankruptcy of *A.* and before his certificate, *B.*, one of his creditors, purchases goods from him. In an action brought by *A.* after obtaining his certificate, for the price of the goods, the old debt cannot be set off, being barred by the certificate. *Hayllar v. Sherwood*, 1833. 1 Nev. & Man. 401.

The trial of a cause was postponed by order of a Court of Nisi Prius, on the defendant's application, on the terms of his paying the plaintiff his costs of the day. The order

of nisi prius was made a rule of Court, and the costs were taxed, after which the defendant became bankrupt:—Held, that he was discharged by his certificate as to these interlocutory costs so ascertained before the bankruptcy. *Jacob v. Phillips*, 1834. 4 Tyrw. 652.

A certificated bankrupt cannot be discharged from arrest for a debt covered by his certificate, till it has been inrolled pursuant to 6 Geo. 4. c. 16. s. 96. *Jacob v. Phillips*, 1834. 4 Tyrw. 652; S. C. 1 Crompt. Mees. & Ross. 195.

A claim founded on a covenant to charge a particular debt upon a specific fund in which the covenantor has no present interest, but merely an expectancy, is not barred by the bankruptcy and certificate of the covenantor, before he acquires an actual interest in the fund. *Lyde v. Mynn*, 1833. 1 Mylne & Keen, 688.

A clerk hired generally by the year at a certain salary, may, upon a dissolution of contract by mutual consent within the year, recover salary *pro rata*, without any express agreement to that effect. The contracts of a trader with his clerks and servants are not dissolved by the issuing a commission of bankruptcy against him, therefore the clerk of a trader against whom a commission of bankruptcy issues during a current year of the hiring of such clerk, may, after the bankrupt has obtained his certificate, recover his salary for the whole year; so also he may recover

pro rata, where the contract has been dissolved by mutual consent within the year. The departure of the clerks upon the ceasing of the trade, is evidence of a dissolution of such contract. *Thorne v. Williams*, 1834. 3 Nev. & Man. 545.

Fees for.

Under the Bankruptcy Court Act the bankrupt is not bound to pay the fee for the signature of the Commissioner to his certificate, but the assignees (*come semble*) are now liable for the payment of it. *Re Dawson*, 1833. 3 Deac. & Chit. 317.

Staying.

See also PETITION TO STAY CERTIFICATE—STAYING CERTIFICATE.

A petition to stay the certificate and to prove was presented: Held, 1. It need not state that the petitioner is a creditor (*sed quære.*) 2. It need not state when the debt was rejected. 3. It need not state what debt was rejected. *Ex parte Robinson, re Case*, 1834. 1 Mont. & Ayr. 705.

CERTIFICATE OF COMMISSIONERS.

A petition to supersede with consent of creditors cannot be entertained without the usual certificate of the Commissioners, nor unless it is set down in the paper for hearing. *Ex parte Croker*, 1833. 3 Deac. & Chit. 9.

CERTIFICATE OF REGISTRAR.

Reviewing.

An application that the officer

of the Court may be directed to review his certificate as to the taxation of costs, may be made by motion. It is not an objection to such application, that the amount of the taxed costs has not been paid into Court, though it may be proper to make such payment one of the terms of the order for re-taxation. *Ex parte Richardson, re Consett*, 1834. 3 Deac. & Chit. 735; S. C. 1 Mont. & Ayr. 377.

CHAMPERTY AND EMBRACERY.

In 1818, *A.* conveys Blackacre to *B.*, *B.* becomes bankrupt, and his assignees convey, in 1833, to *C.* In 1834 *A.* conveys Blackacre to *D.* It is competent to *D.*, in an ejectment brought against him by *C.*, to show that in 1818 *A.* had no legal estate in Blackacre. Whether a conveyance by assignees of a bankrupt where neither bankrupt nor assignees have been in possession within a year, amounts to embracery, *quære?* *Doe v. Powell*, 1834. 3 Nev. & Man. 616.

CHOSE IN ACTION.

See also ASSIGNMENT OF EQUITABLE RIGHTS.

A. made advances to *B.*, a trader, and afterwards took from him as a security, an assignment of an equitable life interest, in stock and other property standing in the name and vested in three trustees under a marriage settlement. There being rumours about the solvency of *B.*, *A.*, in the course of conversation, subse-

quently to the assignment, and not with a view of giving validity to his security, mentioned to one of the trustees who was not the acting trustee, that he was secured by the assignment:—Held, that this communication was a sufficient notice to prevent the interest of *B.* passing to his assignees on his bankruptcy, as property in his order and disposition. *Smith v. Smith*, 1833. 2 Cramp. & Meo. 213; S. C. 4 Tyr. 52.

Upon the assignment of a simple contract debt, the assigner must be considered as having the order and disposition of the debt, with the consent of the true owner, until the debtor has notice of the assignment. Such debt will therefore pass to the assignment under a bankruptcy by virtue of 6 Geo. 4. c. 16. s. 72. and to the assignees under the insolvent debtors' act, 7 Geo. 4, c. 57. s. 31. *Buck v. Lee*, 1834. 3 Nev. & Man. 580.

CLAIM.

Where a sum has been ordered to be paid into Court by the bankrupt in a suit in Chancery still pending against him, a claim was ordered to be entered on the proceedings for the amount, and the assignees were directed to reserve dividends on that sum to be paid to the Accountant-General to the credit of the suit in Chancery. *Ex parte Farden, re Peters*, 1833. 3 Dea. & Chit. 479; S. C. 1 Mont. & Ayr. 219.

Where the bankrupt had been ordered to pay a sum into Court, in a suit in Chancery against him pend-

ing at the time of his bankruptcy, it was ordered by the Court of Review that a claim should be entered for that sum on behalf of the plaintiff in the suit, and that the dividends on that sum should be paid into the Court of Chancery, and invested in the name of the Accountant-General. *Ex parte Hancock, re Gilburd*, 1833. 3 Dea. & Chit. 523; S. C. 1 Mont. & Ayr. 220.

A claim or proof cannot be resisted because the creditor has property belonging to the estate in his possession; that is only a ground to restrain payment of the dividends. The Court has not jurisdiction to recover property alleged to have been given as a fraudulent preference to be delivered up because the party has claimed. *Ex parte Dobson, re Thompson*, 1834. 1 Mont. & A. 666.

COLONIAL LAW.

By the laws of Antigua, slaves were declared to be inheritance and affixed to the freehold; and by 59 Geo. 3. c. 120. s. 9, no deed or instrument conveying any interest in slaves was valid, unless the registered names and descriptions of the slaves were set forth in the instrument, or in some schedule thereof. The bankrupts deposited with B. and Co., as security for a loan of money, a deed of conveyance to the bankrupts of a plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves, but they

were wholly omitted in the memorandum of the deposit:—Held, 1st, that this was nevertheless a good equitable mortgage of the slaves mentioned in the deed. 2d. That the slaves being real property in the island of Antigua, could not be considered as within the order and disposition of the bankrupts at the time of their bankruptcy. *Ex parte Rucker*, 1834. 3 Dea. & Chit. 704; S. C. 1 M. & A. 481.

COMMISSIONERS.

The Court will in all cases uphold the general order of Lord *Loughborough*, which directs, that in country commissions there must be inserted the names of two barristers. *Ex parte Kilsby*, 1833. 3 Dea. & Chit. 19.

Where unfounded charges of corruption were brought against Commissioners by a petitioner, who appeared to be the tool of other parties, the Court ordered the Commissioners their "costs, charges, and expenses," and suspended the order until the attorney for the petitioner should show cause why he should not personally pay the costs. *Ex parte Williams*, 1833. 3 Dea. & Chit. 103.

The bankrupt, who was a tavern keeper, had bought of the petitioner large quantities of wines, lying in the docks, which were sold to him by sample, for stipulated prices, and at long credit, and for which the petitioner delivered to him the usual transfer. The assignees sold the wines by auction at a considerable

loss, in consequence of which the Commissioner made a reduction in the petitioner's proof, on the ground that the prices charged for the wines were too high. Held, that he was not justified in making such reduction. The costs of the petitioner, under these circumstances, were ordered to be paid out of the estate. *Ex parte Reay*, 1833. 3 Dea. & Chit. 175.

If more than the statutable fees are taken by the Commissioners, they are perpetually disqualified from acting under any future fiat. Two travelling fees for attending two meetings on the same day, under the same bankruptcy, are beyond the fees allowed by the statute. *Ex parte Carter, re Wolman*, 1834. 3 Dea. & Chit. 678.

A second fiat issued against one of several partners, after a previous fiat against the other partners, cannot now be directed to the same country Commissioners as those named in in the first fiat, under the 6 Geo. 4. c. 16. s. 17. but must be directed to the new Commissioners appointed under the 1 & 2 W. 4. c. 56. s. 14. *Ex parte Beague, re Schonswar*. 3 D. & C. 747; S. C. 1 M. & A. 445.

Where there are not the requisites to support a fiat, the Chancellor will recommend to the Commissioner to hear counsel against the adjudication; and if the bankruptcy be already found, will stay the insertion of the advertisement in the Gazette, and

supersede. *Ex parte Nokes*, 1834. 1 Mont. & Ayr. 461.

On an application of a tenant of the assignees, a reference was made to the Commissioner, who reported the rent should be reduced, which was done. On the application of some creditors, one of whom offered higher rent, the Court refused to interfere. *Ex parte De Begnis, re Chambers*, 1834. 1 Mont. & Ayr. 277.

Where the last examination of the bankrupt has been adjourned *sine die*, the Court will not order the Commissioners to appoint a time unless misconduct be charged against them, or the bankrupt can show serious injury will accrue. *Ex parte Perkins*, 1834. 1 Mont. & Ayr. 524.

Where there is no charge against Commissioners, they need not appear. *Ibid*.

COMMISSIONERS' FEES.

Under the Bankruptcy Court Act, the bankrupt is not bound to pay the fee for the signature of the Commissioner to his certificate, but the assignees, *come semble*, are now liable for the payment of it. *Re Dawson*, 1833. 3 Dea. & Chit. 317.

If more than the statutable fees are taken by the Commissioners, they are perpetually disqualified from acting under any future fiat. Two travelling fees for attending two meetings on the same day, under the same bankruptcy, are beyond the fees allowed by the statute. *Ex parte Carter, re Wolman*, 1834. 3 Dea. & Chit. 678.

On an unsuccessful application to the Commissioner to expunge a debt under section 60 of 6 G. 4. c. 16. the applicant may be ordered to pay the Commissioners' and solicitor's fees, and the sums paid for the use of the room, &c. *Ex parte Kirkaldy, re Holt*, 1884. 1 Mont. & Ayr. 642.

COMMITMENT.

A bankrupt having been committed by one of the London Commissioners to the custody of the messenger, for not answering satisfactorily, was brought up before two Commissioners, and committed by them to Newgate. Held, that the commitment was illegal, inasmuch as the bankrupt ought to have been brought up and re-examined before a Subdivision Court, consisting of three Commissioners, who must be all present at such re-examination, though they need not be unanimous in the sentence of commitment. On an application for a bankrupt's discharge by habeas corpus, an affidavit may be read, stating circumstances which are not set forth in the warrant of the Commissioners. *Ex parte Lampon*, 1834. 3 Dea. & Chit. 751; S. C. 1 M. & A. 245.

An application to be discharged from custody on the ground of the insufficiency of the Commissioners' warrant must be by petition. *Ex parte Jones*, 1834. 1 Mont. & Ayr. 704.

A prisoner regularly committed by a Commissioner to the messenger, and subsequently irregularly com-

mitted by the Subdivision Court, is not, on a discharge under habeas corpus, remanded to the custody of the messenger. *Ex parte Bardwell, re Venables*, 1834. 1 M. & A. 214.

The Subdivision Court cannot commit, on an adjourned examination, after merely asking, "do you abide by your former answers?" The party must be re-examined. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 193.

After an order to pay within a specified time, the next order is to pay within four days or stand committed; this is of course at the office; but if circumstances render an application to the Court necessary, notice must be given to the other side. *Ex parte Solomons, re Maberley*, 1833. 1 Mont. & Ayr. 269, note.

When a person will be discharged from an attachment for non-payment of money, the process being irregular. *Ex parte Malachy, re Bennetts*, 1834. 1 Mont. & Ayr. 257.

If an order of committal be asked, the affidavit must state that the money is still due and owing, and that the party has not paid, nor any person on his behalf; but the same strictness is not required on an intermediate order. *Ex parte Murray, re Smith*, 1834. 1 Mont. & Ayr. 478.

COMPROMISE.

The Court will not lend its sanction to a compromise of a suit by the assignees, though the master reports it would be for the benefit of all par-

ties. *Ex parte Williams, re Weinkolt*, 1834. 1 Mont. & Ayr. 689.

CONCEALMENT OF PROPERTY.

A bankrupt did not disclose a life interest which he possessed in certain property, when he passed his last examination; and after a lapse of more than twenty years, when four of the Commissioners were dead, he petitioned for a fiat to be issued to fresh Commissioners, and that the assignee might be ordered to account. The Court, under these circumstances, allowed the bankrupt to issue a new fiat in the name of a creditor, but thought that after this concealment he was not entitled to any inquiry against his assignee. *Ex parte Holder*, 1834. 3 Dea. & Chit. 276.

CONCERTED FIAT.

Although a fiat is concerted for the purpose of defending an action brought by a creditor against the bankrupt for the recovery of his debt, yet, where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the Court will dismiss the petition. *Ex parte Mills, re Colman*, 1834. 3 Dea. & Chit. 606; S. C. 1 M. & A. 310.

CONSENT.

See also ACQUIESCENCE.

A petition to supersede with consent of creditors cannot be enter-

tained without the usual certificate of the Commissioners, nor unless it is set down in the paper for hearing. *Ex parte Croker*, 1833. 3 Dea. & Chit. 9.

A petition to supersede a joint Commission, on consent of creditors, cannot be entertained as to any one of the bankrupts who has not surrendered. *Ex parte Knowlson*, 1833. 3 Dea. & Chit. 191.

Where a creditor gave a power of attorney in general terms, but without any express power to consent to a supersedeas, and the signature of the creditor himself to such consent was easily attainable:—Held, that his own signature ought to be procured. *Re Sampson*, 1833. 3 Dea. & Chit. 198.

On a petition for supersedeas with consent of creditors, where one of the creditors had died intestate:—Held, that the bankrupt should either have taken out a limited administration for the purpose of assenting to the supersedeas, or (which would have been the better plan) apply to the Court to expunge the proof. *Ex parte Hall*, 1833. 3 Dea. & Chit. 449; S. C. 1 M. & A. 54.

On a petition to supersede, by consent of creditors, the official assignee need not sign the petition. *Ex parte Parker*, 1833. 3 Dea. & Chit. 112.

Petition for supersedeas, with consent of creditors, one dies insolvent after proof, and his executor does not prove the will:—Held, that

the brother-in-law might sign the consent. Another creditor becomes bankrupt, and one of his assignees is abroad:—Held, that the signature of the other assignee was sufficient, with an affidavit of the consent of the absent assignee. Another creditor who had proved a debt as the continuing partner of a firm that had dissolved their partnership, died before his retiring partner:—Held, that his executor might sign the consent. *Ex parte Leader*, 1833. 3 Dea. & Chit. 468; *S. C.* 1 Mont. & Ayr. 204.

Order refused, for an assignee to bid for the bankrupt's property, although the assignee obtained the consent of a meeting of the creditors, such meeting having been only attended by half in value of the creditors. *Ex parte Beaumont, re Edmonston*, 1834. 3 Dea. & Chit. 549; *S. C.* 1 M. & A. 304.

The Court will supersede where all the creditors consent and the bankrupt has paid 20s. in the pound, though his examination has been adjourned *sine die*. *Ex parte Gudge*. 1 Mont. & Ayr. 341.

If the sole assignee be a creditor and sign the consent to a supersedeas, he need not be served with a petition. *Ex parte Ramsay*, 1834. 1 Mont. & Ayr. 708.

The Court will not confirm a purchase of part of the bankrupt's estate made by an assignee without leave, because a meeting of creditors has consented. *Ex parte Thwaites*,

re Knowles, 1834. 1 Mont. & Ayr. 323.

The consent of the creditors of a bankrupt to the institution of a suit by his assignees, though filed amongst the proceedings in the bankruptcy, must be proved. *Smith v. Briggs*, 1832. 5 Sim. 391. *See quære, see Ex parte Evans*, 3 Dea. & Chit. 470; *Jones v. Yates*, 3 Y. & J. 373; *Piercy v. Roberts*, 1 Mylne & Keen, 4.

In a suit by the assignees of a bankrupt's or insolvent's estate, it is not competent to the defendant to object that the suit has been instituted without the consent of the major part in value of the creditors as required by the bankrupt and insolvent debtors' act. The judgment in such a suit will bind the creditors, but the assignees take upon themselves the responsibility that the suit has been properly instituted and properly conducted. *Piercy v. Roberts*, 1832. 1 Myl. & Keen, 4.

CONSOLIDATION OF ESTATES.

An application to consolidate the joint and separate estates will not be granted if one creditor dissents, unless absolutely necessary. *Ex parte Sheppard*, 1833. 3 Dea. & Chit. 190.

A joint and several creditor proves his debt under two separate estates, after which the joint and separate estates are consolidated:—Held, that the creditor is nevertheless entitled to retain both his proofs.

Ex parte Fuller, 1833. 3 Dea. & Chit. 520; S. C. 1 M. & A. 222.

CONTEMPT.

If an order of committal be asked, the affidavit must state that the money is still due and owing, and that the party has not paid, nor any person on his behalf; but the same strictness is not required on an intermediate order. *Ex parte Murray, re Smith*, 1834. 1 Mont. & Ayr. 478.

CONTINGENT DEBT.

Where the bankrupt had entered into a joint bond with a co-obligor to indemnify the sheriff against any loss he may sustain from relinquishing the possession of goods seized under an execution, and no loss was actually sustained by the sheriff until after the issuing of the fiat:—Held, that the sheriff could prove no debt by virtue of the bond. *Ex parte Marshall*, 1834. 3 Dea. & Chit. 120; S. C. 1 Mont. & Ayr. 145.

DEBT.

The bankrupt having received 550*l.* with his wife on his marriage, gave a bond to trustees conditioned for the payment of 1100*l.* “on receiving notice from the trustees:”—Held, that although no notice was given to the bankrupt before his bankruptcy, this was nevertheless a contingent debt proveable within the provisions of the 56th section of 6 Geo. 4. c. 16. *Ex parte Hooper, re West*, 1834. 3 Dea. & Chit. 655.

R. C. borrowed a sum of money and gave the lenders a bond, by which he and four others bound themselves jointly and severally in a penalty for the regular payment of interest, and for the discharge of the principal and all interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of *R. C.* became bankrupt, and obtained his certificate. At the time of the bankruptcy a forfeiture had accrued by nonpayment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certificate, *R. C.* was called upon for the principal, but did not pay, and payment was enforced from the four co-obligors, who had continued solvent. In an action by one of them against the party who had been bankrupt, for contribution,—Held, that they could not have proved under the commission by sect. 52 of the Bankrupt Act, and therefore that the certificate was no answer to the action. *Clements v. Langley*, 1833. 5 Barn. & Adol. 372.

CONTRACT.

See also AGREEMENT.

Where a landlord agrees to grant a lease to *A.*, his executors, administrators, and assigns, upon certain conditions, and *A.* assigns his interest in the contract to *B.*, and then becomes bankrupt, *B.*, on performing

the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and his right is not affected by a proviso, that in case of the bankruptcy of *A.* the landlord shall have power to re-enter and sell the benefit of the contract and premises, and hold the proceeds, subject to his own claims, for the use of *A.*'s estate. *Morgan v. Rhodes*, 1834. 1 Mylne & Keen, 435.

A clerk hired generally by the year at a certain salary, may, upon a dissolution of contract by mutual consent, within the year recover salary *pro rata*, without any express agreement to that effect.

The contracts of a trader with his clerks and servants are not dissolved by the issuing a commission of bankruptcy against him; therefore the clerk of a trader against whom a commission of bankruptcy issues, during a current year of the hiring of such clerk, may, after the bankrupt has obtained his certificate, recover his salary for the whole year. So, also, he may recover *pro rata* where the contract has been dissolved by mutual consent within the year, but after the issuing of the commission. The departure of the clerks upon the ceasing of the trade, is evidence of a dissolution of such contract. *Thomas v. Williams*, 1834. 3 Nev. & Man. 545.

The common bargain and sale from the Commissioners to the assignees passes an estate tail of which

the bankrupt was seized at the time of his bankruptcy.

Quære, therefore, where the bankrupt was seized of an estate tail, which he represented as an estate in fee simple, and died before the estate was sold under his commission, whether there is any necessity for the Commissioners executing a special conveyance to the purchaser, and what would be the effect of such a conveyance, thus executed, after the death of the bankrupt? *Ex parte Somerville, re Loscombe*, 1834. 3 Dea. & Chit. 668; S. C. 1 Mont. & Ayr. 408.

COPIES.

When the bankrupt petitions to annul the fiat on the ground that he has not committed an act of bankruptcy, the Court will order him to be furnished with copies of the depositions relating to the act of bankruptcy. *Ex parte Smith*, 1833. 3 Dea. & Chit. 101.

Where a fiat is lost, and a party does not choose to rely on secondary evidence of its existence, the proper course is to issue a fresh fiat, and not a duplicate fiat. *Re Levett*, 1834. 3 Dea. & Chit. 567; S. C. 1 Mont. & Ayr. 308.

COSTS.

Generally.

In order to fix the executor of the petitioning creditor with costs, the petitioner must pray costs against

him in his character of executor. *Ex parte Harwood*, 1833. 3 Dea. & Chit. 252.

An application for security for costs must be made before any step is taken by the party applying. *Ex parte Tull, re Davis*, 1833. 3 Dea. & Chit. 503; S. C. 1 Mont. & Ayr. 80.

A., *B.*, *C.*, and *D.*, contract a debt with *W.* for goods supplied to them on their joint account. *A.*, *B.*, and *C.* become bankrupt, and *W.* proves the amount of his debt under their commission, stating in his deposition that *A.*, *B.*, and *C.* only (without noticing *D.*) were jointly indebted to him, but he afterwards sues and recovers the amount of his debt against *D.* the insolvent partner:—Held, that in consequence of the informality of this proof, *W.* must pay the costs of the application of the assignee to expunge it. *Ex parte Adams, re Thackeray*, 1834. 3 Dea. & Chit. 623.

A. and *B.* sue out a commission as solicitors to the petitioning creditor, and the assignees afterwards appoint *C.* to act as solicitor, but it is agreed between him and *A.* and *B.*, with the privity of the assignees, that all three shall jointly act as solicitors and share the profits, and the assignees afterwards recognise the acting of *A.* and *B.* as such joint solicitors:—Held, 1st, that this amounted to a retainer by the assignees of *A.* and *B.* as joint solicitors with *C.* 2dly, that the Court of Review had juris-

diction on the petition of *A.* and *B.* (*C.* having been served with it,) to enforce the payment by the assignees of the solicitor's bill of costs. 3dly, that the assignees were not liable for the payment of such costs, whether they had funds in their hands or not. *Ex parte Hammond, re Wooding*, 1834. 3 Dea. & Chit. 626; S. C. 1 Mont. & Ayr. 328.

A memorandum in writing drawn up entirely by the clerk of an equitable mortgagee, and which was not signed by the bankrupt, is not sufficient to exempt the mortgagee from paying the costs of the petition for the sale. *Ex parte Emmerton, re Kingsford*, 1834. 3 Dea. & Chit. 654.

When a petition is dismissed with costs, the Court will not limit the payment of costs merely as to the affidavits that were read on the hearing of the petition; for in general all affidavits filed are entered as read. *Ex parte Lucas, re Oldham*, 1834. 3 Dea. & Chit. 664; S. C. 1 Mont. & Ayr. 405.

To support an objection to the hearing of a petition on the ground of the costs not having been paid by the petitioner, as directed by a former order, there must have been a personal demand of the costs. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 Mont. & Ayr. 405.

Where bills of exchange proved under a fiat have been lost by the creditor, and he therefore cannot produce them for the purpose of re-

ceiving his dividends, and an application to this Court becomes necessary to receive them, the creditor must pay the costs of the application. *Ex parte Trust, re Hartsinck*, 1834. 3 Deac. & Chit. 750.

An assignee is entitled to his travelling expenses incurred by him subsequent to the choice of assignees. *Ex parte Lovegrove, re Cooper*, 1834. 3 Deac. & Chit. 763.

Where nearly six years had elapsed since the solicitor's bill of costs had been taxed by the Commissioners, and the assignee was a party to that taxation, and to the subsequent payments in discharge of the bills, the Court refused, on his application, to refer them for re-taxation. *Ex parte Hutchinson, re Freeman*, 1834. 3 Deac. & Chit. 829.

The trial of a cause was postponed by order of a Court of Nisi Prius, on the defendant's application, on the terms of his paying the plaintiff his costs of the day. The order of nisi prius was made a rule of Court, and the costs were taxed, after which the defendant became bankrupt:—Held, that he was discharged by his certificate as to these interlocutory costs so ascertained before the bankruptcy. *Jacobs v. Phillips*, 1834. 4 Tyrw. 652; S. C. 1 Crompt., Mees., & Rosc. 195.

In an action by a messenger to a commission of bankrupt against the assignee appointed under 6 Geo. 4. c. 16., to recover the costs of advertising a meeting of creditors, and

of hiring a room for them to assemble in, it is sufficient to prove the plaintiff's appointment, and that the expenses incurred by him were reasonable, without proving express employment or recognition of him as messenger by the assignee. *Hamber v. Purser*, 1833. 4 Tyrw. 41; S. C. 2 Crompt. & Mees. 209.

On a discharge under the Habeas Corpus Act, the prisoner's costs must be paid by the assignees, the estate being sufficient to recoup them. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 193.

If a bill filed by assignees be dismissed with costs, the Lord Chancellor has no jurisdiction to order the costs to be retained by the assignees out of the bankrupt's estate. *Turner v. Hibbert*, 1834. 1 Mont. & Ayr. 243. But see *Ex parte Keys*, 3 Dea. & Chit. 263; S. C. 1 M. & A. 226.

If a bill in equity by assignees be dismissed with costs, they must apply to the Commissioners, in the first instance, to allow them out of the estate. *Ex parte Gibson, re Phillips*, 1834. 1 Mont. & Ayr. 479.

If the assignees continue to defend a suit instituted against the bankrupt, which is decided in favour of the plaintiff, with costs, and they have no assets, they are not personally liable, unless they vexatiously continued the defence. *Ex parte Gibson, re Phillips*, 1834. 1 Mont. & Ayr. 479.

On an unsuccessful application to the Commissioner to expunge a debt, under section 60 of 6 Geo. 4. c. 16. the applicant may be ordered to pay the Commissioners' and solicitor's fees, and the sums paid for the use of the room, &c. *Ex parte Kirkaldy, re Holt*, 1834. 1 Mont. & Ayr. 642.

On Appeal from Commissioners.

The bankrupt, who was a tavern keeper, had bought of the petitioners large quantities of wines, lying in the docks, which were sold to him by sample for stipulated prices and at long credit, and for which the petitioners delivered to him the usual transfer warrants. The assignees sold the wines by auction, at a considerable loss. In consequence of which, the Commissioner made a reduction in the petitioner's proof, on the ground that the prices charged for the wines were too high. Held, that he was not justified in making such reduction. The costs of the petitioner, under these circumstances, were ordered to be paid out of the estate. *Ex parte Reay*, 1833. 3 Dea. & Chit. 175.

A creditor tenders a proof for 3500*l.*, which the Commissioners reject *in toto*; and after presenting a petition against their decision, an order is made, by consent, that he shall prove for 500*l.* The Court would not grant him costs out of the estate, but ordered each party

to pay his own costs. *Ex parte Waterhouse*, 1833. 3 Dea. & Chit. 108.

Where sums of money advanced and to be advanced are secured by deed, and any of the dealings then contemplated by the parties are tainted with usury, the deed is wholly void as a security, although the legal debt is not impeached. *A.* employs *B.* as a calico printer, and before the accounts for printing become due, from time to time advances him various sums of money, charging him, besides interest, with 1*l.* 10*s.* per cent. as a trade premium, which it was customary for persons in the same trade to take under the like circumstances. *A.* was also in the habit of paying debts owing by *B.* to other persons before they became due. *A.* deducted the usual discount, but charged *B.* with the full amount, besides interest and the trade premium above mentioned. *Seemle*, that both these modes of dealing were usurious; they were however, at best, of so suspicious a nature that the Court declined to make an order for the sale of the property under the deed, but directed an action of ejectment to be brought by *A.* against the assignees. *A.* having succeeded upon the trial, applied for the costs of the petition, which the Court, under these circumstances, declined to grant, the petition being against the judgment of the Commissioners. *Ex parte Millington*, 1833. 3 Dea. & Chit.

298. *S. P. and S. C.* 1 Mont. & Ayr. 114.

Where a party petitions against the decision of the Commissioners, and an action is directed to be brought, the result of which is in his favour, he is not entitled to the costs of the petition, but only to the costs of the action. *Ex parte Millington*, 1833. 3 Dea. & Chit. 307. *S. P. and S. C.* 1 Mont. & Ayr. 114.

Where, after the rejection of a proof by the Commissioners, the creditor on petition succeeds in establishing his debt by the affidavits of witnesses who were not tendered to the Commissioners for examination, he pays his own costs. *Ex parte Price, re Price*, 3 Dea. & Chit. 489; *S. C.* 1 M. & A. 51.

The rule for not allowing costs to a party appealing against the judgment of the Commissioners, will be relaxed in favour of a petitioner establishing a clear and indisputable right of proof which the Commissioners had rejected. *Ex parte Hooper, re West*, 1834. 3 Dea. & Chit. 655.

COSTS OF THE DAY.

When a petition has been half heard, it cannot be amended on payment merely of the common costs of the day. *Ex parte Turvill*, 1833. 3 Dea. & Chit. 346.

It is an objection to the hearing of a petition, that the affidavits in support of it were sworn before the petition was presented; but the Court

will sometimes discountenance such an objection, by allowing the petitioner to re-swear his affidavits, and ordering the petition to stand for that purpose, and also by refusing the costs of the day to respondent. *Ex parte Brown, re Lloyd*, 1833. 3 Dea. & Chit. 496.

Where a respondent takes a formal objection to a petition for want of parties, and the petition is for this cause ordered to stand over, the costs of the day are in the discretion of the Court. *Ex parte Thompson, re Eeroyd*, 1834. 3 Dea. & Chit. 612; *S. C.* 1 M. & A. 312, 324.

COSTS OF TAXATION.

An order was made for the taxation of four several bills of a solicitor, for various business done for the same assignee, under which more than a sixth part was taken off the gross amount of the four bills, but not off the amount of every one of the bills:—Held, that as all the bills were incurred by the same person, in the same right, there was no need for a separate order of taxation for each bill; and that, as more than a sixth was taken off from the whole amount, the solicitor must pay the costs of taxation. *Ex parte Barrett*, 1834. 3 Dea. & Chit. 731; *S. C.* 1 M. & A. 447.

COUNSEL.

See also BARRISTER.

Where there are not the requi-

sites to support a fiat, the Chancellor will recommend to the Commissioner to hear counsel against the adjudication; and if the bankruptcy be already found, will stay the insertion of the advertisement in the Gazette, and supersede. *Ex parte Nokes*, 1834. 1 Mont. & Ayr. 461.

COUNTRY COMMISSION.

The Court will in all cases uphold the general order of Lord *Loughborough*, which directs, that in country commissions there must be inserted the names of two barristers. *Ex parte Kilsby*, 1833. 3 Dea. & Chit. 19.

COURT OF REVIEW.

Quære. Can the Court of Review entertain a petition of appeal from the rejection by the Commissioner of a proof of debt on a question of fact? An objection that the Court of Review had no jurisdiction, cannot be taken on appeal, if not taken below. *Ex parte Turner, re Muckenzie*, 1834. 1 Mont. & Ayr. 357.

COVENANT.

It is no defence at law to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the defendants, the lessees, have performed their covenants with the assignees of the *cestui que trust*. *Britten v. Britten*, 1834. 4 Tyrw. 473.

A claim founded on a covenant

to charge a particular debt on a specific fund, in which the covenantor has no present interest, but merely an expectancy, is not barred by the bankruptcy and certificate of the covenantor before he acquires an actual interest in the fund. *Lyde v. Myns*, 1833. 1 Myl. & Keen, 683.

CREDITORS.

See also CONSENT.

Creditors may petition to tax the solicitor's bill, though paid, the assignees having been guilty of dereliction of duty in not filing the bills with the proceedings. *Ex parte Castle, re Payne*, 1834. 1 Mont. & Ayr. 665.

On a *viâ voce* examination on a petition to supersede, a creditor is not a competent witness. *Ex parte Lavender*, 1834. 1 Mont. & Ayr. 702.

CROSS BILLS.

See also BILLS OF EXCHANGE.

A. and *B.* exchange their acceptances of various bills drawn upon them respectively by *C.*, and all three become bankrupt before any of the bills fall due; the acceptances of *A.* are negotiated by the drawer *C.*, and are proved by the holders under each commission, who receive dividends on their respective proofs:—Held, that *A.*'s assignees might prove the amount of *B.*'s acceptances under *B.*'s commission, subject to a retention of the dividends until it was ascertained what

each estate would pay on the whole of their liabilities. *Ex parte Solarte*, 1834. 3 Dea. & Chit. 419; S. C. 1 Mont. & Ayr. 270.

On the 2nd January 1832, defendants, bankers, received from B. C. a bill of exchange for 760*l.*, drawn by M. on his partners, indorsed by him to B. C., and by B. C. to defendants. On the 6th the bill became due, and M. having failed the same day, the bill was dishonoured. On the 7th, the defendants, who then had in their hands sufficient assets of B. C. to cover the bill, returned it to B. C., with a receipt for the amount indorsed on it, and having, on the 2d, entered the bill to the credit of B. C. now entered it as a debit. The defendants were also the acceptors of a bill for 1000*l.*, drawn by B. C., indorsed to M., and due on the 12th of January. On the 9th B. C. sent back the 760*l.* bill to the defendants, with instructions to carry into effect views expressed by B. C. in a letter addressed to defendants on the 6th, in anticipation of M.'s failure; that letter was as follows:—"We think that you would be entitled to retain the 1000*l.* as a set-off for the 760*l.*; at all events we will trust to your doing the best for us in this matter." In an action brought against the defendants by the assignees of M. on the 1000*l.* bill, the jury having found that the transaction between the defendants and B. C. on the 760*l.* bill was closed on the 7th:—Held, that

they could not set off that bill against the 1000*l.* bill. *Belcher v. Lloyd*, 1833. 10 Bing. 310; S. C. 3 Moo. & Sc. 822.

DAMAGES.

Where the bankrupt had entered into a joint bond with a co-obligor to indemnify the sheriff against any loss he may sustain from relinquishing the possession of goods seized under an execution, and no loss was actually sustained by the sheriff until after the issuing of the fiat:—Held, that the sheriff could prove no debt by virtue of the bond. *Ex parte Marshall*, 1834. 3 Dea. & Chit. 120. S. C. 1 M. & A. 145.

DEATH.

Where two bankrupts, under a joint fiat, obtain a joint certificate from their creditors, and one of the bankrupts dies before the certificate is allowed, the Court will, on motion, allow it as the separate certificate of the survivor. *Ex parte Carter*, 1834. 3 Dea. & Chit. 549; S. C. 1 Mont. & Ayr. 115.

DEBTS,

Assignment of.

Upon the assignment of a simple contract debt, the assignor must be considered as having the order and disposition of the debt, with the consent of the true owner, until the debtor has notice of the assignment. Such debt will, therefore, pass to the assignees under a bankruptcy, by

virtue of 6 Geo. 4. c. 16. s. 72., and to the assignees under the Insolvent Debtors' Act, 7 Geo. 4. c. 75. s. 31. *Buck v. Lee*, 1834. 3 Nev. & Man. 580.

DEBTOR AND CREDITOR.

A., in France, employs *B.*, in England, to sell wines on commission, as well as to purchase other wines on *A.*'s account in London, for which purpose he furnishes him with letters of credit; the wines were generally bought and sold by *B.* in his own name, part of the wines consigned by *A.* were in the dock warehouses, standing in *B.*'s name, and part formed one indiscriminate stock in *B.*'s cellar. *A.* closes the connection with *B.*, and requires him to deliver up all the wines, but *B.* neglects to comply with this requisition, and shortly afterwards becomes bankrupt:—Held, that *A.* might sue the purchaser of the wines in the name of *B.* or his assignees. *Ex parte Moldaut*, 1833. 3 Dea. & Ch. 351.

DEEDS.

Construction of.

A., who was partner with *B.*, deposited with their bankers the deeds of a freehold cotton mill belonging to *A.*, as a security for advances made by the bankers for the use of the firm of *A.* and *B.*, and in the memorandum of deposit it was stated that the buildings were insured for 2000*l.*, and "the machinery, &c. for 2000*l.* more;" a steam-

engine and other machinery, having been, previous to the deposit, erected by *A.* and *B.* for the purposes of their trade. *A.* and *B.* continued in possession of the premises, with all the machinery, up to the period of their bankruptcy:—Held, first, that the bankers had a lien on the steam-engine and machinery, as well as on the building. Secondly, that the steam-engine and machinery, though removeable by a tenant, as fixtures erected by him for the purposes of trade, yet being firmly attached to the walls and floors of the buildings, and being such fixtures as are frequently put up by the owners of cotton mills, and let with the mills to a tenant, were not to be considered as in the reputed ownership of the bankrupts, within the meaning of the 6 Geo. 4. c. 16. s. 72. *Ex parte Lloyd, re Walmsley*, 1834. 3 Dea. & Chit. 765; S. C. 1 Mont. & Ayr. 494.

H. S., who employs *E.* and Co. as his brokers, and *L.* and Co. as his general agents, gives *E.* and Co. the following undertaking:—In consideration of your allowing *L.* and Co. to draw upon you to the extent of 12,000*l.*, and your accepting three drafts accordingly, I hereby guarantee to you that amount, it being distinctly understood that payment of these drafts is to be provided either by himself or *L.* and Co. in direct discountable bills. *E.* and Co. accordingly accept and pay these drafts, in consideration of which they

receive from *H. S.* and *L. and Co.* various substituted bills. *H. S.* and *L. and Co.* respectively become bankrupts, when the substituted bills are still running, and which are not paid when they fall due:—Held, that *L. and Co.* were entitled to prove under the commission against *H. S.* the balance that was due to them in respect of their advances on the faith of this undertaking, which was not so much a guarantee as an original undertaking of *H. S.* as a principal. And *semble*, it would have been proveable, even though the instrument might be considered as a guarantee. *Ex parte Simpson, re Sudell*, 1834. 3 Dea. & Chit. 792; *S. C.* 1 M. & A. 541.

Possession of.

The Court will not take a trust deed out of the possession of the bankrupt's trustees. *Ex parte Holder*, 1834. 3 Dea. & Chit. 276.

DELIVERY.

F. and Co. sold cochineal to *John W.*, for which a small part of the price was paid in cash, and the remainder by two bills at four months, but the cochineal was to remain in the hands of *F. and Co.* as a security for the payment of the bills. The bills not being paid when due, *John W.* sent *F. and Co.* two other bills drawn by himself on *Joshua W.* for which no consideration was given to *Joshua W.*, the acceptor. Before these bills fell due both *John W.* and

Joshua W. became bankrupts, and the price of cochineal had fallen so much in the market, that *F. and Co.* afterwards sold it for not a third of the price at which *John W.* had bought it, and they then proved for the deficiency under *John W.*'s commission:—Held, that they had also a right to prove the amount of the two bills under *Joshua W.*'s commission, without deducting the proceeds arising from the sale of the cochineal. *Ex parte Bonham*, 1833. 3 Dea. & Chit. 285.

DELIVERY UP OF SPECIFIC CHATTELS.

A. in France employs *B.* in England to sell wines on commission, as well as to purchase other wines on his account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold by *B.* in his own name; part of the wines consigned by *A.* were in the dock warehouses standing in *B.*'s name, and part formed one indiscriminate stock in *B.*'s cellar. *A.* closes the connection with *B.*, and requires him to deliver up all the wines, but *B.* neglects to comply with this requisition, and shortly afterwards becomes bankrupt:—Held, that the Court had jurisdiction to order the assignees of *B.* to deliver up these wines to *A.* *Ex parte Moldaut*, 1833. 3 Dea. & Chit. 351.

The Court has not jurisdiction to order property alleged to have been given as a fraudulent prefer-

ence, to be delivered up because the party has claimed. *Ex parte Dobson, re Thompson*, 1834. 1 Mont. & Ayr. 666.

A claim on proof cannot be resisted, because the creditor has property belonging to the estate in his possession; that is only a ground to restrain payment of the dividends. *Ex parte Dobson, re Thompson*, 1834. 1 Mont. & Ayr. 666.

DEMAND.

The bankrupt having received 500*l.* with his wife on marriage, gave bond to trustees for payment of 1100*l.* "on receiving notice from the trustees":—Held that, although no notice were given to the bankrupt before the bankruptcy, it was nevertheless a contingent debt, proveable within 6 Geo. 4. c. 16. s. 56. *Ex parte Hooper, re West*, 1834. 3 Dea. & Chit. 655.

To support an objection to the hearing of a petition, on the ground of the costs not having been paid by the petitioner as directed by a former order, there must have been a personal demand of the costs. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 Mont. & Ayr. 405.

DEPOSIT.

A London banker, having a branch bank at Edinburgh, stops payment on the 2nd January, and writes to his agent at Edinburgh, apprising him of the fact, and directing the business of the branch bank to

be discontinued. On the 4th January, before this notice reaches the agent, the petitioner pays into the Edinburgh bank the 305*l.* 15*s.* in notes and cash, to be remitted to the house in London; but after the news reaches Edinburgh, and whilst the notes were still in the agent's possession, gives him notice not to part with them, and they remained in his hands on the 26th January, when a fiat issued against the banker in London. The agent at Edinburgh having a lien on the funds in his hands, the assignees permitted him to retain the 305*l.* 15*s.* in part satisfaction of his lien:—Held, that the assignees were bound to refund this sum to the petitioners. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 58.

The same order was made as in *Ex parte Cunningham, supra*, p. 58, although the notes delivered to the banker's agent were not identified. *Ex parte Solomons*, 1833. 3 Dea. & Chit. 77.

The same order was also made in this case. The notes in this case were paid in by the customer on the 3rd January to a sub-agent of the banker at Glasgow, who remitted them on the 4th to the managing agent at Edinburgh. *Ex parte Wylie*, 1833. 3 Dea. & Chit. 82.

The order made in *Ex parte Cunningham* confirmed on appeal to the Lord Chancellor. *Ex parte Belcher*, 1833. 3 Dea. & Chit. 87.

The Court will not exempt a mortgagee who bids from paying a deposit. *Ex parte Tatham, re Shepard*, 1833. 1 Mont. & Ayr. 335.

DEPOSITIONS.

A party is not estopped from amending his deposition of proof, by making a second deposition contrary to the first: the only question is, which is the most worthy of credit. *Ex parte Britten*, 1833. 3 Dea. & Chit. 35.

When the bankrupt petitions to annul the fiat on the ground that he has not committed an act of bankruptcy, the Court will order him to be furnished with copies of the depositions relating to the act of bankruptcy. *Ex parte Smith*, 1833. 3 Dea. & Chit. 101.

Depositions taken before Commissioners of bankrupt, and inrolled by the assignees according to 6 Geo. 4. c. 16. s. 96. are not evidence against them in an action brought to dispute the commission, by disproving the act of bankruptcy on which it is founded. *Chambers v. Bernasconi*, 1834. 4 Tyrw. 531.

DISCHARGE.

On a discharge under the habeas corpus act, the prisoner's costs must be paid by the assignees, the estate being sufficient to recoup them. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 193.

A prisoner regularly committed by a Commissioner to the messenger,

and subsequently irregularly committed by the Subdivision Court, is not, on a discharge under habeas corpus, remanded to the custody of the messenger. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 214.

When a prisoner will be discharged from an attachment for non-payment of money, the process being irregular. *Ex parte Malachy, re Bennetts*, 1834. 1 Mont. & Ayr. 257.

An application to be discharged from custody on the ground of the insufficiency of the Commissioners' warrant, must be by petition. *Ex parte Jones*, 1834. 1 Mont. & Ayr. 704.

DISTRESS FOR RENT.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency, although occasioned by the payment of the rent. *Ex parte Cocks*, 1833. 3 Dea. & Chit. 8.

In replevin the defendant avowed for rent in arrear, from one *J. M.*, and also claimed the goods as being the property of himself and another, as assignees of *J. M.*, against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record, the Court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim

the goods as a distress for rent, and also to set up the title of the assignees. *Semble*, that pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant, founded on his demand for rent. *Emery v. Mucklow*, 1834. 4 Moore & Sco. 263; S. C. 10 Bing. 401.

DIVIDEND.

One of the assignees having the sole charge of paying the dividends, pays the dividend of a creditor to a person who is not duly authorized to receive it,—the two other assignees are equally responsible to the creditor for the amount of the dividend. *Ex parte Winnall*, 1833. 3 Dea. & Chit. 22.

Where a creditor delayed proving her debt until after a dividend had been declared, having relied upon the promise of the assignee to inform her of the progress of the commission, which he failed to do, an order was made that the creditor might prove her debt within a month, and that the payment of the dividend should be in the meantime suspended. *Ex parte Colton*, 1833. 3 Dea. & Chit. 194.

When the omission to prove a debt proceeds from a creditor's own laches, the Court will not order a dividend to be stayed until his petition to prove can be heard. *Ex parte Brees*, 1833. 3 Dea. & Chit. 283.

B. & Co. being largely indebted to R. & Co., indorse to them various bills

which had been drawn or indorsed by C. & Co., for the accommodation of B. & Co. B. & Co. and C. & Co. become respectively bankrupt, and R. & Co. prove the bills under each commission. Held, that the estate of C. & Co. was a security to make good the amount of principal and interest due to R. & Co. from B. & Co., and that R. & Co. were entitled to receive dividends, on their proof under C. & Co.'s commission, until not only the balance of the principal sum due from B. & Co., but also all interest thereon, was fully satisfied. *Ex parte Reed, re Gregory*, 1833. 3 Dea. & Chit. 481.

After an order made for the distribution of unclaimed dividends, fresh assets came to the hands of the assignees, which enabled them to make a further dividend. Held, that the further dividend ought to be declared on the debts of all the creditors, including those who had not claimed the former dividend, unless in the interim any of the non-claimants had renewed their proofs, in which case they must be placed *pari passu* with the other creditors; but the Commissioners ought not, out of the further assets, to lay aside a sum equivalent to the dividends already unclaimed, as a fund in reserve to meet any future renewal of the proofs. *Ex parte Mowbray, re Surtees*, 1834. 3 Dea. & Chit. 552; S. C. 1 M. & A. 300.

A claim or proof cannot be resisted because the creditor has pro-

perty belonging to the estate in his possession; that is only a ground to restrain payment of the dividends. *Ex parte Dobson, re Thompson*, 1834. 1 Mont. & Ayr. 686.

DOCKET PAPERS.

Docket papers and the fiat cannot be amended by inserting the bankrupt's place of business. *Quære*, If the docket be correct, and the fiat incorrect through the error of the office? *Ex parte Graves, re Wyatt*, 1834. 1 Mont. & Ayr. 315.

A. tendered docket papers, of which the affidavit of debt was sworn before the solicitor to the petitioning creditor; at the same time *B.* tendered papers not so sworn; they drew lots, and the lot fell to *A.*, whose papers were entered. The Court refused to interfere to give the fiat to *B.* *Ex parte Dakins, re Hughes*, 1834. 1 Mont. & Ayr. 417.

DOUBLE PROOF.

F. & Co. sold cochineal to *John W.*, for which a small part of the price was paid in cash, and the remainder by two bills at four months, but the cochineal was to remain in the hands of *F. & Co.* as a security for the payment of the bills. The bills not being paid when due, *John W.* sent *F. & Co.* two other bills, drawn by himself on *Joshua W.*, for which no consideration was given to *Joshua W.*, the acceptor. Before these bills fell due, both *John W.* and *Joshua W.* became bankrupts, and the price of cochineal had fallen so much in the

market, that *F. & Co.* afterwards sold it for not a third of the price at which *John W.* had bought it, and they then proved for the deficiency under *John W.*'s commission. Held, that they had also a right to prove the amount of the two bills under *Joshua W.*'s commission, without deducting the proceeds arising from the sale of the cochineal. *Ex parte Bonham*, 1833. 3 Dea. & Chit. 285.

A joint and several creditor proves his debt under two separate estates, after which the joint and separate estates are consolidated. Held, that the creditor is nevertheless entitled to retain both his proofs. *Ex parte Fuller*, 1833. 3 Dea. & Chit. 520; S. C. 1 M. & A. 222.

EFFECT OF BANKRUPTCY.

An agreement for a lease is not annulled by the bankruptcy of the intended lessee. *Morgan v. Rhodes*, 1834. 1 Mont. & Ayr. 214.

An agreement for a lease is not annulled by the insolvency of the intended lessor. *Crosby v. Tooke*, 1833. 1 Mont. & Ayr. 215, n.; S. C. 1 Mylne & Keen. 431.

A solvent partner may sue out a writ in the name of his co-partner, or, if bankrupt, in the names of his assignees as well as his own, in order to recover a debt due to the partnership. *Whithead v. Hughes*, 1833. 4 Tyrw. 92.

A clerk hired generally by the year, at a certain salary, may, upon a dissolution of contract by mutual

consent within the year, recover salary *pro rata*, without any express agreement to that purpose.

The contracts of a trader with his clerks and servants, are not dissolved by the issuing a commission of bankruptcy against him; therefore the clerk of a trader, against whom a commission of bankruptcy issues during a current year of the hiring of such clerk, may, after the bankrupt has obtained his certificate, recover his salary for the whole year.

So also he may recover *pro rata* where the contract has been dissolved by mutual consent within the year, but after the issuing of the commission. The departure of the clerks, upon the ceasing of the trade, is evidence of a dissolution of such contract. *Thomas v. Williams*, 1834. 8 Nev. & Man. 545.

ELECTION.

The Court would not restrain an action in which the bankrupt intended fairly to try the validity of the commission.

If bankrupt petition to supersede, having actions pending, he must elect. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 299.

EMBEZZLEMENT.

The bankrupt, who was an actuary of a savings' bank, had embezzled various sums of money to a large amount, and made false entries and alterations in the cash book, to conceal the deficiency in his accounts, but

what were the precise sums embezzled, or on what day they were taken, the trustees of the bank were unable to point out. The Commissioners refused to allow the trustees to prove against the bankrupt's estate, until they prosecuted the bankrupt for embezzlement. Upon which they preferred five several indictments, but failed in convicting him, through their inability to prove an embezzlement of any specific sum, according to the requisites of the statute. Upon a second application of the trustees to prove, the Commissioners refused to admit their proof for any sums which were not included in the indictments:—Held, that the trustees having *bond fide* prosecuted the indictments against the bankrupt, and used their best endeavours to convict him of the felony, were entitled to prove for the whole amount of the sum which the bankrupt had embezzled. *Ex parte Jones*, 1838. 3 Dea. & Chit. 525.

ENTRY OF PROCEEDINGS OF RECORD.

Under the 6 Geo. 4. c. 16. s. 96, the Court have a general power, upon petition, to direct the proceedings to be entered of record. *Ex parte Thomas*, 1838. 3 Dea. & Chit. 292.

EQUITABLE MORTGAGE.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the de-

ficiency, although occasioned by the payment of the rent. *Ex parte Cocks*, 1833. 3 Dea. & Chit. 8.

The petition of an equitable mortgagee must be served upon the assignees; service on the solicitor is irregular. *Ex parte Cocks*, 1833. 3 Dea. & Chit. 24.

After an order for sale obtained by an equitable mortgagee, if the assignees delay the sale, *semble*, that the course is not to present a fresh petition for a sale, but to prosecute the former order. *Ex parte Robinson*, 1833. 3 Dea. & Chit. 103.

Where freehold title-deeds were intended to be deposited with an equitable mortgagee, together with deeds relating to leasehold property, and were accordingly specified in the memorandum of deposit, the freehold property was included in the order for sale. *Ex parte Leathes*, 1833. 3 Dea. & Chit. 112.

Under what circumstances a reserved bidding refused to assignees, on the sale of property under an equitable mortgage. *Ex parte Bernard*, 1833. 3 Dea. & Chit. 291; S. C. 1 M. & A. 81.

The bankrupt being indebted to the petitioners, as the acceptor of two bills of exchange, entered into an agreement with them and *W. L.* that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of *W. L.* for sale: Held, that the petitioners might claim as equitable mortgagees, but subject to any prior lien of *W. L.*

Ex parte Greenhill, 1833. 3 Dea. & Chit. 334.

A memorandum in writing, drawn up entirely by the clerk of an equitable mortgagee, and which was not signed by the bankrupt, is not sufficient to exempt the mortgagee from paying the costs of the petition for the sale. *Ex parte Emmerton, re Kingsford*, 1834. 3 Dea. & C. 654.

By the laws of Antigua, slaves were declared to be inheritance, and affixed to the freehold, and by 59 Geo. 3. c. 120. s. 9. no deed or instrument conveying any interest in slaves was valid, unless the registered names and descriptions of the slaves were set forth in the instrument, or in some schedule thereof. The bankrupt deposited with *B. and Co.*, as security for a loan of money, a deed of conveyance to the bankrupts of a plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit:—Held, 1st, that this was nevertheless a good equitable mortgage of the slaves mentioned in the deed. 2nd, That the slaves being real property in the island of Antigua, could not be considered as within the order and disposition of the bankrupts at the time of their bankruptcy. *Ex parte Rucker*, 1834. 3 Dea. & Chit. 704; S. C. 1 Mont. & Ayr. 481.

A., who was a partner with *B.*,

deposited with their bankers the deeds of a freehold cotton mill belonging to *A.*, as a security for advances to be made by the bankers for the use of the firm of *A.* and *B.*; and in the memorandum of deposit it was stated that the buildings were insured for 2000*l.*, and "the machinery &c. for 2000*l.* more;" a steam engine and other machinery having been, previous to the deposit, erected by *A.* and *B.* for the purposes of their trade. *A.* and *B.* continued in possession of the premises, with all the machinery, up to the period of their bankruptcy:—Held, 1st, That the bankers had a lien on the steam engine and machinery, as well as on the buildings. 2. That the steam-engine and machinery, though removable by a tenant, as fixtures erected by him for the purpose of his trade, yet being firmly attached to the walls and floors of the buildings, and being such fixtures as are frequently put up by the owners of cotton mills, and let with the mill to a tenant, were not to be considered as in the reputed ownership of the bankrupt, within the meaning of the 6 *Geo.* 4. c. 16. s. 72. *Ex parte Loyd, re Ogden*, 3 *Dea. & Chit.* 765. *S. C.* 1 *Mont. & Ayr.* 494.

A mortgagee of a term made an equitable mortgage, and subsequently purchased the equity of redemption. Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if it be rejected by the assignees. *Ex parte Tuffnell*,

re Watts, 1834. 1 *Mont. & Ayr.* 620.

A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption in case any partner wished to dispose of his share. A partner deposited an attested copy of the lease, in order to give an equitable mortgage on his share to a stranger. Held, the Court could not make the usual order for sale, &c., as the partnership accounts must first be taken, which this Court has no jurisdiction to do, and the case was not free from doubt. [*Cross, J.*, dissent.] *Ex parte Broadbent, re Borron*, 1834. 1 *Mont. & Ayr.* 635.

EQUITY OF REDEMPTION.

A mortgagee of a term gave an equitable mortgage, and subsequently purchased the equity of redemption. Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if it be rejected by the assignees. *Ex parte Tuffnell, re Watts*, 1834. 1 *Mont. & Ayr.* 620.

ESCROW.

Held by Lord *Denman*, C. J., *Parke* and *Patteson*, Js., and *semble*, per *Littledale*, J., that the execution of a deed by which a party conveys his whole property to the use of some of his creditors, is a sufficient act of bankruptcy to sustain a commission, though the deed was executed by the bankrupt only, and is not proved to have been acted upon, or to have

passed out of the bankrupt's hands. *Botcherby v. Lancaster*, 1834. 1 Adol. & Ellis, 77; S. C. 3 Nev. & Man, 383.

ESTATE TAIL.

The common bargain and sale from the Commissioners to the assignees passes an estate tail, of which the bankrupt was seised at the time of his bankruptcy.

Quære, therefore, where the bankrupt was seised of an estate tail, which he represented as an estate in tail in fee simple, and died before the estate was sold under his commission, whether there is any necessity for the Commissioners executing a special conveyance to the purchaser, and what would be the effect of such a conveyance, thus executed, after the death of the bankrupt? *Ex parte Somerville, re Loscombe*, 1834. 3 Dea. & Chit. 668; S. C. 1 M. & A. 408.

EVIDENCE.

See also AFFIDAVITS—EXAMINATION —DEPOSITIONS.

The examination of the assignee before the Commissioner as to the sale of the property, was permitted to be read as evidence of the assignee's misconduct, although it did not pray a resale. *Ex parte Turvill*, 1833. 3 Dea. & Chit. 346.

Where, after the rejection of a proof by the Commissioners, the creditor on petition succeeds in establishing his debt by the affidavit of

witnesses who were not tendered to the Commissioners for examination, he pays his own costs. *Ex parte Price*, 3 Dea. & Chit. 489; S. C. 1 Mont. & Ayr. 51.

An application by the bankrupt to stay the advertisement in the Gazette, on his own affidavit, merely denying the existence of the petitioning creditor's debt, or the committal of any act of bankruptcy, without any allegation of his solvency, will not be entertained, unless the proceedings are produced for the inspection of the Court. *Ex parte Pownall*, 1834. 3 Dea. & Ch. 723; S. C. 1 M. & A. 314.

Solicitor allowed to take affidavits off the file to attend action therewith, undertaking to return them in the same state. *Ex parte Whaley*, 1834. 1 Mont. & Ayr. 634.

Depositions taken before Commissioners of bankrupt, and inrolled by the assignees according to 6 Geo. 4. c. 16. s. 96. are not evidence against them in an action brought to dispute the commission, by disproving the act of bankruptcy on which it is founded. *Chambers v. Bernasconi*, 1834. 4 Tyrw. 531.

In an action by a messenger to a commission of bankrupt against the assignee, appointed under 6 Geo. 4. c. 16, to recover the costs of advertising a meeting of creditors, and of hiring a room for them to assemble in, it is sufficient to prove the plaintiff's appointment, and that the expenses incurred by him were reason-

able, without proving express employment or recognition of him as messenger by the assignee. *Hamber v. Purser*, 1833. 4 Tyrw. 41; S. C. 2 Crompt. & Mees. 209.

A party who seeks to avoid a payment or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of a bankruptcy, must show, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy. *Morgan v. Brundrett*, 1833. 5 Barn. & Adol. 289.

In a case within the 92d section of the Bankrupt Act, (6 Geo. 4. c. 16.) where the assignees went into evidence of the trading in consequence of a notice to dispute, without advertising to the section or relying upon the depositions, and having failed to establish the trading, were nonsuited, the Court refused to set the nonsuit aside. *Johnson v. Piper*, 1833. 2 Nev. & Man. 672.

Case lies for a judgment creditor against a sheriff for not selling within a reasonable time after a seizure under a fi. fa. But the plaintiff in such action can recover nominal damages only, unless actual injury be proved.

Where, therefore, the sheriff delays selling for an unreasonable time, and before the sale, but after the time when he ought to have sold, receives notice of a fiat in bankruptcy against the execution debtor, and afterwards returns that he has the levy money in his hands, but that he has received

such notice, it lies upon the plaintiff to prove the trading, act of bankruptcy &c., so as to show that, by reason of the sheriff's delay, the right of property in the goods seized passed before the sale into other hands, and that the plaintiff's execution had been thereby frustrated. *Bales v. Wingfield*, 1833. 10 Bing. 831.

The consent of the creditors of a bankrupt to the institution of a suit by his assignees, though filed amongst the proceedings in the bankruptcy, must be proved. *Smith v. Biggs*, 1832. 5 Sim. 391.

Sed quare. See *Ex parte Evans*, 3 Dea. & Chit. 470; *Jones v. Yates*, 3 Y. & J. 373; *Piercy v. Roberts*, 1 Myl. & K. 4.

In a suit by the assignees of an uncertificated bankrupt, for the recovery of property fraudulently delivered by him to the defendants, the plaintiffs read the examination of one of the defendants, taken before the Commissioners on the first day, but declined to read the examination taken on the second day—ruled, that the whole must be read. A plaintiff cannot read the cross-examination of one of the defendant's witnesses, if the defendant declines to read the examination in chief. The evidence of a bankrupt, which in one respect is in his own favour, but in another respect against himself, is receivable. *Smith v. Biggs*, 1832. 5 Sim. 391.

EXAMINATION.

Collateral questions trying the

truth of a material part of the witness's story may be put. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 206.

On habeas corpus, the party may object that a question was illegal, though he did not so object when before the Commissioner. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 207.

In a suit by the assignees of an uncertificated bankrupt, for the recovery of property fraudulently delivered by him to the defendants, the plaintiffs read the examination of one of the defendants, taken before the Commissioners on the first day, but declined to read the examination taken on the second day—ruled, that the whole must be read. A plaintiff cannot read the cross-examination of one of the defendant's witnesses, if the defendant declines to read the examination in chief. *Smith v. Biggs*, 1832. 5 Sim. 391.

EXCEPTIONS.

A party objecting to the master's report, should either present a petition to except to it, or give notice to the other side of the nature of the objection. *Ex parte Mallard*, 1833. 3 Dea. & Chit. 243.

A petition to confirm a report stood in the paper before a petition excepting to it, the counsel for the first petition has a right to begin, by stating the facts of his petition, before the counsel for the second petition proceeds to state and argue

the exceptions. *Ex parte Morley, re Leigh*, 1833. 3 Dea. & Chit. 509.

EXECUTION.

Whether a sheriff, who, in obedience to a fieri facias, seizes the goods of a person who has committed an act of bankruptcy previously to issuing the execution, is liable in trover by the assignees of the latter, *quære*. *Garland v. Carlisle*, 1833. 3 Tyrw. 705; *S. C.* 2 Crompt. & Mee. 31.

EXECUTOR.

In order to fix the executor of the petitioning creditor with costs, the petitioner must pray costs against him in his character of executor. *Ex parte Harwood*, 1833. 3 Dea. & Chit. 252.

Quære, Whether the Court has jurisdiction over the executor of an assignee? *Ex parte Turvill, re Miller*, 1834. 1 Mont. & Ayr. 686.

It seems that a sole executor who becomes bankrupt may sign his own certificate. *Re Lawrence*, 1834. 1 Mont. & Ayr. 453.

EXPUNGING PROOF.

See also PETITION TO EXPUNGE.

The Court can reverse the decision of a Subdivision Court on a matter of fact as to expunging a proof, that not being within 1 & 2 Will. 4. c. 56. s. 30. *Ex parte Baldwin, re Smith*, 1834. 1 Mont. & Ayr. 615.

FEEES TO COMMISSIONERS.

See COMMISSIONERS' FEES.

FELONY.

See also EMBEZZLEMENT—FORGERY.

Proof by joint estate for fraudulent abstraction, when admissible. *Ex parte Turner, re Mackenzie*, 1833. 1 Mont. & Ayr. 54, affirmed *id.* 357.

FIAT.

Generally.

See also SECOND FIAT.

A new fiat issued, on the application of the petitioning creditor, to give effect to a more recent act of bankruptcy, the time for opening the first fiat not having expired. *Re Crawley*, 1833. 3 Dea. & Chit. 251.

Where a fiat is lost, and a party does not choose to rely on secondary evidence of its existence, the proper course is to issue a fresh fiat, and not a duplicate fiat. *Re Levett*, 1834. 3 Dea. & Chit. 567; S. C. 1 M. & A. 308.

A fiat omitted to be opened within the time limited by the general order, is not for that cause absolutely superseded, but only supersedable. What is required to be stated in an affidavit on an application to enlarge the time for opening a fiat. *Ex parte Smith, re James*, 1834. 3 Dea. & Chit. 761; S. C. 1 M. & A. 473.

A petitioning creditor having become bankrupt before the fourteen days for opening the fiat had elapsed, it was ordered that another creditor

might take new docket papers into the office, and if the first fiat was not prosecuted, that he might then issue a fresh fiat. *Ex parte Smith*, 1833. 3 Dea. & Chit. 309; S. C. 1 M. & A. 78.

Plaintiff being liable to defendant for the costs of a nonsuit, issued a fiat of bankruptcy against the defendant. The Court refused to stay defendant's proceedings in the action. *Eicke v. Nokes*, 1834. 1 Bing. New Cases, 69.

Amending.

Quære, Whether the date of a fiat which had not been opened can be altered, so as to give effect to a subsequent act of bankruptcy? *Re Roberts*, 1833. 3 Dea. & Chit. 315.

Quære, Whether the Court can direct the amendment of a fiat, without the approbation of the Lord Chancellor, and whether this can be done now, after adjudication? *Semble*, that the name of the Commissioner, who has not acted under the fiat being mis-spelt, is not such an error as to require amendment. *Re Bell*, 1833. 3 Dea. & Chit. 326.

Unopened fiat not amended. *Ex parte Hawes, re Griffith*, 1834. 1 M. & A. 708.

Unopened fiat amended by inserting the proper parish. *Ex parte Elliott, re Humphrey*, 1834. 1 M. & A. 664.

Unopened fiat amended to agree with docket papers. *Ex parte Jervis, re Elliott*, 1834. 1 M. & A. 619.

Docket papers and the fiat can-

not be amended by inserting the bankrupt's place of business. *Quære*, if the docket be correct, and the fiat incorrect through the error of the office? *Ex parte Graves, re Wyatt*, 1834. 1 Mont. & Ayr. 315.

Annulling and Superseding.

See also PETITION TO ANNUL AND SUPERSEDE—SUPERSEDEAS.

Two creditors persuade a bankrupt to execute an assignment of his effects to them for the benefit of his creditors, and then issue a fiat against him, setting up this assignment as the act of bankruptcy. They then seize his furniture and stock, without taking any proceedings under the fiat. On the application of a *bond fide* creditor, this fiat was ordered to be annulled and a new one issued. *Ex parte Mucklow*, 1833. 3 Dea. & Chit. 25.

A fiat superseded, with costs to be paid by the petitioning creditor, on the ground of the bankrupt's minority; but the Court made no order for the assigning the bond. *Ex parte Hehir*, 1833. 3 Dea. & Chit. 107.

Where a creditor petitioned to annul the fiat on the ground of the misdescription of the bankrupt, without any intention on his part to issue another fiat, and the misdescription was so slight that no creditor was deceived by it, the Court dismissed the petition. *Ex parte Mills, re Colman*, 1834. 3 Dea. & Chit. 606. S. C. 1 M. & A. 310.

Where a creditor petitions to annul a fiat after the bankrupt has

obtained his certificate, there must be a distinct allegation of fraud against the bankrupt in the petition; it is not sufficient to state fraud in the affidavit. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

A tender made to the petitioning creditor of the payment of his debt, after a docket has been already struck against the bankrupt, although before the fiat was actually issued, is not sufficient to defeat the fiat. *Ex parte Jones, re Lamplough*, 1834. 3 Dea. & Chit. 697; S. C. 1 M. & A. 442.

A fiat omitted to be opened within the time limited by the general order, is not for that cause absolutely superseded, but only supersedable. *Ex parte Smith, re James*, 1834. 3 Dea. & Chit. 761; S. C. 1 M. & A. 473.

Auxiliary and Renewed.

An auxiliary fiat granted to examine witnesses in London, the original fiat being worked at Portsmouth. *Ex parte Carter*, 1833. 3 Dea. & Chit. 106.

A bankrupt did not disclose a life interest which he possessed in certain property, when he passed his last examination; and after a lapse of more than twenty years, when four of the Commissioners were dead, he petitioned for a fiat to be issued to fresh Commissioners, and that the assignee might be ordered to account. The Court, under these circumstances, allowed the bankrupt to issue a new fiat in the name of a

creditor, but thought that, after this concealment, he was not entitled to any inquiry against his assignee. *Ex parte Holder*, 1834. 3 Dea. & Chit, 276.

A renewed fiat can only be issued by a creditor whose debt is sufficient to support the original fiat. *Ex parte Maude*, 1833. 3 Dea. & Chit. 365; S. C. 1 Mont. & Ayr. 46.

Fraudulent and Concerted.

Two creditors persuade a bankrupt to execute an assignment of his effects for the benefit of his creditors, and then issue a fiat against him, setting up this assignment as the act of bankruptcy. They then seize his furniture and stock, without taking any proceedings under the fiat. On the application of a *bona fide* creditor, this fiat was ordered to be annulled, and a new one issued. *Ex parte Mucklow*, 1833. 3 Dea. & Chit. 25.

Although a fiat is concerted for the purpose of defeating an action brought by a creditor against the bankrupt for the recovery of his debt, yet where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the Court will dismiss the petition. *Ex parte Mills, re Colman*, 1834. 3 D. & C. 606; S. C. 1 M. & A. 310.

Where a creditor petitions to annul a fiat after the bankrupt has obtained his certificate, there must be a distinct allegation of fraud

against the bankrupt in the petition; it is not sufficient to state fraud in the affidavit. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

FIXTURES.

A., who was partner with *B.*, deposited with their bankers the deeds of a freehold cotton mill belonging to *A.* as a security for advances made by the bankers for the use of the firm of *A.* and *B.*, and in the memorandum of deposit it was stated that the buildings were insured for 2000*l.*, and "the machinery &c. for 2000*l.* more," a steam-engine and other machinery having been, previous to the deposit, erected by *A.* and *B.* for the purposes of their trade. *A.* and *B.* continued in possession of the premises, with all machinery, up to the period of their bankruptcy:—Held, first, that the bankers had a lien on the steam-engine and machinery as well as on the building. Secondly, that the steam-engine and machinery, though movable by a tenant as fixtures erected by him for the purpose of trade, yet being firmly attached to the walls and floors of the buildings, and being such fixtures as are frequently put up by the owners of cotton mills, and let with the mills to a tenant, were not to be considered as in the reputed ownership of the bankrupts, within the meaning of the 6 Geo. 4. c. 16. s. 72. *Ex parte Lloyd, re Ogden*,

1834. 3 Dea. & Chit. 765; *S. C.* 1 M. & A. 494.

Where the lessee for years of a house, being also possessed of the fixtures therein by separate purchase, mortgaged his term with the fixtures, and afterwards became bankrupt:—Held, that his assignee, who removed and converted them, was liable in trover by the mortgagee to pay the value of them while fixed on the demised premises. *Boydell v. M'Michael*, 1834. 3 Tyrw. 974; *S. C.* 1 Crompt., Mees., & Rosc. 177.

In 1797 premises in Lancashire described as "land, a dwelling-house, machine-house, and other buildings and erections," were conveyed in fee to one of several partners. The conveyance stated them to be then in the possession of that partner and another of his then partners. Machinery and utensils were afterwards placed thereon by the firm for the purpose of carrying on the business of calico printers. The machinery and utensils were firmly fixed to the freehold, yet in such a manner that they might be easily removed without material injury to themselves or the buildings. In that part of the country similar articles so fixed are commonly bought, sold, and removed, without treating them as fixtures. In taking stock yearly between 1804 and 1825, the buildings and land were valued and classed separately from the machinery and fixtures, but the whole

was always dealt with and considered as partnership property. In 1828, two of the partners (then seised in fee of the freehold land and buildings under a conveyance, not mentioning machinery or fixtures) mortgaged them for a term, "and also the steam-engine, mill gearing, heavy gear, millwright work, fixed machinery, and other matters and things standing and being in or upon the thereby demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same or any part thereof." They remained in possession and carried on the works until 1829, when they compounded with their creditors, and afterwards until they became bankrupts. In April 1831, their assignees sold and removed the machinery and utensils, except two steam-engines, with the first motion and main shafts attached to them, and two water-wheels, which supplied power to the rest:—Held, first, that the machinery and utensils so removed having been affixed to the inheritance for the purpose of trade only, in a place where as such they would commonly have been removed, and being in fact removable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only, which passed to the assignees of the bankrupts. Secondly, that the mortgage deed was only intended to pass that part of the machinery which, from the circum-

stances of its erection, necessarily became part of the freehold. *Trappes v. Harter*, 1833. 3 Tyrw. 603; *S. C.* 2 Crompt. & Mees. 153.

A steam-engine erected for the purpose of working a colliery to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in 6 Geo. 4. c. 16. s. 72., nor had the bankrupt the actual or apparent ownership. *Coombs v. Beaumont*, 1833. 5 Barn. & Adol. 72.

FORGERY.

F., a partner in a banking-house, transferred bank stock belonging to a customer by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by *F.*, who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but with common diligence would have known of it. *Quære*, whether the customer can prove for the value of the stock under the commission? An action ordered, to try whether the partners were indebted to the customer. *Ex parte Bolland, re Marsh*, 1834. 1 Mont. & Ayr. 570.

F., a partner in a banking-house, transferred bank stock be-

longing to a customer, by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by *F.*, who was subsequently executed for other forgeries. The other partners were ignorant of the transaction, but with common diligence would have known it:—Held, the customer could maintain an action against the partners for money had and received. *Keating v. Marsh*, 1834. 1 M. & A. 582, affirmed *ibid.* 592.

FOREIGN PROCESS.

A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign government. The bills were not paid;—process of insolvency issued against the foreign firm;—and a commission against the English partner:—Held, the agent may prove under the commission, but will be restrained from receiving dividends unless he elect not to prove under the insolvency abroad. *Ex parte De Mattos, re Vanzeller*, 1834. 1 Mont. & Ayr. 345, affirming *Ex parte Cotesworth*, 1 D. & C. 281; *S. C.* Mont. & B. 92.

FRAUD.

Proof by joint estate for fraudulent abstraction, when admissible. *Ex parte Turner, re Mackenzie*, 1833. 1 Mont. & Ayr. 54, affirmed *ibid.* 357.

FRAUD ON CREDITORS.

See also FRAUDULENT PREFERENCE.

A trader, on his marriage, received a fortune of 5000*l.* with his wife, and settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent; and it was provided, that if he should survive his wife, and the issue of the marriage should fail, and he should then be or should have been a bankrupt, fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the 5000*l.* was settled, but the whole of the settled fund was the husband's property, and it did not appear from any of the expressions in the settlement what was the consideration for the provision as to the fifteen sixty-sixths of the stock:—Held, that the limitations over in the event of the bankruptcy of the husband, were good as to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder. *Lester v. Garland*, 1832. 5 Sim. 205.

By Persons in Fiduciary Situations.

The Court will not depart from the general rule, that the solicitor to the commission shall not be allowed to purchase any of the bankrupt's property. *Ex parte Farley*, 1833. 3 Dea. & Chit. 110.

An assignee, who was also a mortgagee of the bankrupt's freehold property, having purchased it for himself when it was put up for sale, the estate was ordered to be resold, subject to any claims of the assignee by virtue of his mortgage. *Ex parte Turvill*, 1833. 3 Dea. & Chit. 346.

Although it is the usual and the prudent practice for a mortgagee to apply to the Court for leave to bid, the Court will not rescind the sale where the mortgagee has purchased the property without such leave, if the purchase has been made by him *bona fide*. *Ex parte Ashley, re Bell*, 1833. 3 Dea. & Chit. 510; S. C. 1 M. & A. 82.

Order refused for an assignee to bid for the defendant's property, although the assignee obtained the consent of a meeting of the creditors, such meeting having been only attended by half in value of the creditors. *Ex parte Beaumont, re Edmonston*, 1834. 3 Dea. & Chit. 549; S. C. 1 M. & A. 804.

The Court will not confirm a purchase of part of the bankrupt's estate made by an assignee without leave, because a meeting of creditors has consented. *Ex parte Thwaites, re Knowles*, 1834. 1 Mont. & Ayr. 323.

Plaintiff, an attorney, conducting a commission of bankrupt, having received a debt due to the bankrupt, undertook to pay the defendant, solicitor of the bankrupt, the surplus of the sum so received, should any re-

main, after defraying certain charges incurred by plaintiff, if defendant would pay plaintiff his costs of conducting the commission:—Held, not a sufficient consideration to support an action against the defendant on his promise to pay the plaintiff's costs. *Haslam v. Sherwood*, 1834. 10 Bing. 540.

FRAUDULENT PREFERENCE AND ASSIGNMENT.

An insolvent compounds with her creditors for 13s. 6d. in the pound, but promises to pay one of her creditors the whole of his debt, in order to induce him to sign the composition deed. After paying him in full she contracts a fresh debt with him, and then becomes bankrupt:—Held, that the payments made to the creditors, above the composition of 13s. 6d. in the pound, were fraudulent and void, and that the creditor could not prove for the amount without first deducting the payments. *Ex parte Minton, re Green*, 1834. 8 Dea. & Chit. 688; S. C. 1 M. & A. 440.

A conveyance of part of a bankrupt's property, in trust to sell and dispose of the proceeds as he shall direct, is not an act of bankruptcy. *Robinson v. Carrington*, 1833. 1 Mont. & Ayr. 1.

A trader entitled to large freehold and leasehold estates, but greatly embarrassed, and having committed acts of bankruptcy, conveyed his free-

hold and leasehold estates to trustees, upon trust to sell or mortgage, and to apply the produce as he should direct. It appeared that the trust deed was executed under advice for the purpose of effecting a conversion of the trader's property, with a view to an arrangement with his creditors, to which he was himself considered incompetent, from the state of his health:—Held, that the trust deed was not an act of bankruptcy. *Greenwood v. Churchill, Robinson v. Lord Carrington*, 1833. 1 Mylne & Keen, 546.

An assignment by a trader of his whole stock, with intent to abscond from his creditors and carry off the purchase money, is not an act of bankruptcy, when the purchaser pays a fair price for the goods, and is ignorant of the trader's design. *Baxter v. Pritchard*, 1834. 1 Adol. & Ellis, 456; S. C. 3 Nev. & Man. 638.

A sale of the whole of a trader's property is not of itself an act of bankruptcy. The party who seeks to treat the sale as an act of bankruptcy, must show some fact from which fraud may be inferred. *Rose v. Haycock*, 1827. 1 Adol. & Ellis, 460 n.

A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must show, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy. *Morgan v. Brundrett*, 1833. 5 Barn. & Adol. 289.

Held, by Lord Denman, C. J., Parke and Patteson, Js., and *semble*, per Littledale, J., that the execution of a deed by which a party conveys his whole property to the use of some of his creditors, is a sufficient act of bankruptcy to sustain a commission, though the deed was executed by the bankrupt only, and is not proved to have been acted upon, or to have passed out of the bankrupt's hands. *Botcherby v. Lancaster*, 1834. 1 Adolph. & Ellis, 77; S. C. 3 Nev. & Man. 383.

R., having committed a secret act of bankruptcy, assigned chattels to the defendant as a security for money lent him by the defendant, in trust to permit *R.* to use them till March 1833, and then to sell them in discharge of the debt, if unpaid. In October 1832, within two months of this assignment, a commission of bankrupt was issued against *R.*:—Held, that the assignment was not protected by 6 Geo. 4. c. 16. s. 82. *Cannan v. Denew*, 1833. 10 Bing. 292; S. C. 3 Moo. & Sc. 761.

A trader conveying away property to such an extent as will prevent him from continuing his business and render him insolvent, commits an act of bankruptcy; but those who rely upon such act of bankruptcy on a trial must show that it was calculated to have the alleged effect, by evidence of the general state of the party's affairs at the time of such conveyance.

It is not sufficient to prove that the trader, under pecuniary pressure,

disposed of some articles essential to the carrying on of his business, as that a miller, by bill of sale, transferred his waggon and horses to a creditor who had arrested him. *Wedge v. Newton*, 1833. 4 Barn. & Adol. 831.

A party who seeks to avoid payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must show, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy. *Morgan v. Brundrett*, 1833. 5 Barn. & Adol. 289.

M., a trader, engaged in extensive concerns, was in perilous circumstances and likely to become bankrupt, although not suspected, from January 1831 to January 1832, when he actually became bankrupt. Among others he owed his son 12,000*l.*, which debt, upon his son's marriage, was settled on the son's wife. In May 1831, some of *M.*'s property in Middlesex was released from mortgage; and *M.*, at the request of his son, on the 31st July 1831, conveyed it to the trustees under his son's marriage settlement, as a security for or in discharge of the debt due from him to his son. The transfer was not registered, or otherwise made public, till after *M.*'s bankruptcy. A jury having found that it was not made voluntarily by way of fraudulent preference, or in contemplation of bankruptcy, the

Court refused to grant a new trial. *Belcher v. Prettie*, 1834. 10 Bing. 408; S. C. 4 Moore & Sco. 295.

FUND IN COURT.

After an order was made for the distribution of unclaimed dividends, fresh assets came to the hands of the assignees, which enabled them to make a further dividend:—Held, that the further dividend ought to be declared on the debts of all the creditors, including those who had not claimed the former dividend, unless in the interim any of the non-claimants had renewed their proofs, in which case they must be placed *pari passu* with the other creditors; but the Commissioners ought not out of the further assets to lay aside a sum adequate to the dividends already unclaimed, as a fund in reserve to meet any future renewal of the proofs. *Ex parte Mowbray, re Surtees*, 1834. 3 Dea. & Chit. 552; S. C. 1 Mont. & Ayr. 300.

FUTURE EFFECTS.

By the 6 Geo. 4. c. 16. s. 127. it is provided, that if any person who shall have been discharged by certificate, or shall have compounded with his creditors, or shall have been discharged under any insolvent act, shall be or become bankrupt, and shall have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce sufficient to pay his creditors 15s. in the pound,

such certificate shall only protect his person from arrest; but his future estate vests in his assignees under the said commission:—Held, that the clause was retrospective, and that it applied to discharges by bankruptcy or insolvency before the passing of the act. *A.*, in the year 1815, was discharged under an insolvent act, and in 1830 obtained his certificate under a commission of bankrupt issued in 1829, under which commission his estate produced less than sufficient to pay his creditors 15s. in the pound. *A.*, in the year 1832, opened an account with the Bank of England, and a sum of 294*l.* 15s. was deposited by him in the bank:—Held, that an action for money had and received, brought by the assignees under the commission against the Governor and Company of the Bank of England, to recover the amount so deposited, was maintainable. *Elston v. Braddick*, 1834. 2 Crompt. & Mees. 435; S. C. 4 Tyrw. 122.

The price of goods sold by an uncertificated bankrupt, may be recovered by him against the vendee, his assignees not interfering. *Haylar v. Sherwood*, 1833. 1 Nev. & Man. 401.

GAMING.

A petition to stay the certificate, charging that the bankrupt admitted that he had lost 25*l.* in one sitting, is demurrable; it ought positively to allege the fact, that the money was

lost in one day. *Ex parte Crouch*, 1883. 3 Dea. & Chit. 17.

GENERAL ORDER.

A legal mortgage of, an equitable estate is within Lord *Loughborough's* general order. *Ex parte Aple, re Friend*, 1834. 1 Mont. & Ayr. 621.

GUARANTEE.

H. S., who employs *E. & Co.* as his brokers, and *L. & Co.* as his general agents, gives *E. & Co.* the following undertaking:—"In consideration of your allowing *L. & Co.* to draw upon you to the extent of 12,000*l.*, and your accepting three drafts accordingly, I hereby guarantee to you that amount; it being distinctly understood that payment of these drafts is to be provided either by myself or *L. & Co.*, in direct discountable bills." *E. & Co.* accordingly accept and pay these drafts, in consideration of which they receive from *H. S.* and *L. & Co.* various substituted bills. *H. S.* and *L. & Co.* respectively become bankrupts, when the substituted bills are still running, and which are not paid when they fall due:—Held, that *L. & Co.* were entitled to prove under the commission against *H. S.* the balance that was due to them in respect of their advances on the faith of this undertaking, which was not so much a guarantee as an original undertaking of *H. S.* as a principal. And, *semble*, it would have been proveable, even though the instrument might be con-

sidered as a guarantee. *Ex parte Simpson, re Sudell*, 1834. 3 Dea. & Chit. 792; S. C. 1 M. & A. 541.

HABEAS CORPUS.

See also COMMITMENT.

On a discharge under the habeas corpus act, the prisoner's costs must be paid by the assignees, the estate being sufficient to recoup them. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 193.

On habeas corpus, the party may object that a question was illegal, though he did not so object when before the Commissioner. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 207.

HEARING.

See also PETITION, HEARING OF—
RE-HEARING.

On an appeal in bankruptcy, the appellant's counsel are entitled to open the case. *Ex parte Belcher*, 1833. 3 Dea. & Chit. 87.

A formal objection to a notice of motion is waived by the party appearing and requesting further time to oppose it. *Ex parte Morland*, 1833. 3 Dea. & Chit. 248.

When a petition has been half heard, it cannot be amended on payment merely of the common costs of the day. *Ex parte Turvil*, 1833. 3 Dea. & Chit. 346.

Where a party petitions *qua* creditor, an objection to the validity of his debt is not a preliminary objection, although he is bound to prove

that he is legally a creditor. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

INDEMNITY.

An official assignee, having no funds in hand, cannot be compelled to join in a suit in equity with the other assignees, without being indemnified as to the costs. But if he improperly refuses to join in such suit, he may be made a defendant, and then incur the risk of having to pay his own costs. *Ex parte Evans*, 1834. 3 Dea. & Chit. 470; S. C. 1 Mont. & Ayr. 355.

Where a sole assignee was in insolvent circumstances, and there was some suspicion attached to the debts of the creditors who elected him, an order was made that he should be restrained from acting as assignee, and that one or more persons should be appointed to act in his name, giving him a proper indemnity. *Ex parte Copeland, re Weston*, 1834. 3 Dea. & Chit. 561. S. C. 1 Mont. & Ayr. 305.

INDICTMENT.

The bankrupt, who was an actuary of a savings' bank, had embezzled various sums of money to a large amount, and made false entries and alterations in the cash-book to conceal the deficiency in his accounts, but what were the precise sums embezzled, or on what day they were taken, the trustees of the bank were unable to point out. The

Commissioners refused to allow the trustees to prove against the bankrupt's estate, until they prosecuted the bankrupt for embezzlement, upon which they preferred five several indictments against him, but failed in convicting him, through their inability to prove an embezzlement of any specific sum according to the requisites of the statute. Upon a second application of the trustees to prove, the Commissioners refused to admit their proof for any sums which were not included in the indictments:—Held, that the trustees having *bond fide* prosecuted the indictments against the bankrupt, and used their best endeavours to convict him of the felony, were entitled to prove for the whole amount of the sum which the bankrupt had embezzled. *Ex parte Jones*, 1833. 3 Dea. & Chit. 525.

INFANT.

A fiat superseded, with costs to be paid by the petitioning creditor, on the ground of the bankrupt's minority; but the Court made no order for assigning the bond. *Ex parte Hehir*, 1833. 3 Dea. & Chit. 107.

INJUNCTION TO RESTRAIN ACTIONS.

The Court would not restrain an action in which the bankrupt intended fairly to try the validity of the commission. If bankrupt petition to supersede, having actions pending, he must elect. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 299.

The Court has jurisdiction to restrain the bankrupt from bringing actions to upset his commission. Thus after twenty-two years and acquiescence the Court will restrain the bankrupt from bringing actions against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 283.

Long acquiescence is enough to refuse to supersede on the application of the bankrupt, but not alone enough to enable the Court to restrain him from bringing actions. *Ibid.* 297.

The Court has power to stay any action brought by the bankrupt in any Court. *Ibid.* 290.

INROLMENT.

A certificated bankrupt cannot be discharged from arrest for a debt covered by his certificate, till it has been inrolled pursuant to 6 G. 4. c. 16. s. 96. *Jacobs v. Phillips*, 1834. 4 Tyrw. 652; S.C. 1 Crompt. Mees. & Rosc. 195.

INSPECTORS.

Where the interest of the joint creditors appears *prima facie* adverse to that of the separate creditors, the Court will, on the application of the latter, appoint an inspector to take care of their interests. *Ex parte Dawson*, 1833. 3 Dea. & Chit. 2.

INSURANCE SHARES.

Where shares of an insurance company are held in the name of the

bankrupt as trustee, they are not in his reputed ownership. What is notice to the office? *Ex parte Watkins, re Kidder*, 1834. 1 M. & A. 689.

INTEREST.

B. and Co., being largely indebted to *R.* and Co., indorse to them various bills, which had been drawn or indorsed by *C.* and Co. for the accommodation of *B.* and Co. *B.* and Co. and *C.* and Co. respectively become bankrupt, and *R.* and Co. prove the bills under each commission:—Held, that the estate of *C.* and Co. was a security to make good the amount of principal and interest due to *R.* and Co. from *B.* and Co., and that *R.* and Co. were entitled to receive dividends on their proof under *C.* and Co.'s commission, until not only the balance of the principal sum due from *B.* and Co. but also all interest thereon, was fully satisfied. *Ex parte Reed, re Gregory*, 1833. 3 Dea. & Chit. 481.

Section 132 of 6 Geo. 4. c. 16. as to interest, is not retrospective. *Ex parte Phillips*, 1834. 1 Mont. & Ayr. 674.

INTESTACY.

On a petition for a supersedeas with consent of creditors, where one of the creditors had died intestate:—Held, that the bankrupt should either have taken out a limited administration for the purpose of assenting to the supersedeas, or (which would have been the better plan) apply to the

Court to expunge the proof. *Ex parte Hall*, 1833. 3 Dea. & Chit. 449; *S. C.* 1 Mont. & Ayr. 54.

Petition for supersedeas with consent of creditors; one dies insolvent after proof, and his executor does not prove the will:—Held, that his brother-in-law might sign the consent. Another creditor becomes bankrupt, and one of his assignees is abroad:—Held, that the signature of the other assignee was sufficient with an affidavit of the consent of the absent assignee. Another creditor who had proved a debt as the continuing partner of a firm that had dissolved their partnership, died before his retiring partner:—Held, that his executrix might sign the consent. *Ex parte Leader*, 1833. 3 Dea. & Chit. 468; *S. C.* 1 Mont. & Ayr. 204.

INVESTMENT.

An action for money had and received lies against an official assignee appointed by the Court of Review, to recover money received by him while acting under a void commission, and not paid into the Bank of England, as directed by the 1 & 2 *Will.* 4. c. 56. s. 22.

Quære, Whether the bankrupt, who procured the appointment of the defendant to the office of assignee, could afterwards charge him with having received moneys of the bankrupt to his, the bankrupt's use; *semble*, not. *Munk v. Clarke*, 1833. 3 Moore & Sco. 463.

JOINT DEBT.

J. apprenticed his son to the bankrupt, two years before his bankruptcy, and agreed to pay a premium of 200*l.* *J.* was in partnership with *T.*, and the bankrupt owed them a joint debt exceeding the amount of the apprentice fee due from *J.* to the bankrupt. *J.* cannot set off the apprentice fee against the joint debt due from the bankrupt to *J.* and *T.* The Court, under these circumstances, ordered 100*l.* to be paid by *J.* to the assignees, together with the costs of the petition. *Ex parte Soames*, 1833. 3 Dea. & Chit. 320.

JOINT FIAT.

Where two bankrupts under a joint fiat obtain a joint certificate from their creditors, and one of the bankrupts dies before the certificate is allowed, the Court will on motion allow it as the separate certificate of the survivor. *Ex parte Carter*, 1834. 3 Dea. & Chit. 549; *S. C.* 1 Mont. & Ayr. 115.

B. is a partner with *A.* as nail manufacturers, and with *C.* as grocers. The firm of *B.* and *C.* advance monies to the firm of *A.* and *B.*:—Held, that as *B.* and *C.* were not liable for the debts of *A.* and *B.*, *B.* and *C.* could prove under a fiat issued against *A.* and *B.* *Ex parte Thompson, re Ecroyd*, 1834. 3 Dea. & Ch. 612; *S. C.* 1 Mont. & Ayr. 312, 324.

JUDGMENTS.

A judgment on a warrant of attorney is not within the protection of 1 *W.* 4. c. 7. s. 7, and therefore is within the 108th section of 6 *Geo.* 4. c. 16. In assumpsit for money had and received against the sheriff, to recover the proceeds of a sale under a *fi. fa.* issued upon a judgment not protected by 1 *W.* 4. c. 7. s. 7, the plaintiff was held liable, where notice of an act of bankruptcy committed before the sale, and of a docket struck thereon, was given to him when the sale was nearly completed, after which he received the proceeds, and handed them over to the execution creditor. *Crossfield v. Stanley*, 1834. 1 *Nev. & Mann.* 668; *S. C.* 4 *Barn. & Ad.* 87.

JURISDICTION.

A., before his bankruptcy, agrees to take a lease of a cotton mill, and enters into possession. After his bankruptcy one of his assignees takes possession, and agrees to accept the lease, a draft of which was sent to the assignees, containing covenants personally binding on them during the whole of the term; and one in particular, to prevent them from assigning without the licence of the lessor:—Held, that the assignees were not bound to accept of such a lease, and even if they were, that the Court of Review had no jurisdiction to compel a specific performance of the agreement. *Ex parte Lucas*,

1833. 3 *Dea. & Chit.* 144; *S. C.* 1 *Mont. & Ayr.* 93.

A previous order of the Vice-Chancellor, which had been omitted to be drawn up, ordered to be entered *nunc pro tunc*, if the Vice-Chancellor should think fit. *Ex parte Lewis*, 1833. 3 *Dea. & Chit.* 198.

On a petition by a creditor to supersede on the ground of concert, before the passing of the Bankruptcy Court Act, the Lord Chancellor had directed an issue, which was found in favour of the commission. The assignees then presented a petition for a new trial. Upon the hearing of these parties, the Court of Review, being satisfied of the fact of concert, thought no new trial was necessary, and ordered the commission to be superseded. [Dissent. Sir *J. Cross.*] *Ex parte Harwood*, 1833. 3 *Dea. & Chit.* 252. But see the next case, *Ibid.* 263.

Where, on a petition to supersede, the Lord Chancellor had directed the trial of an issue, and the verdict was in favour of the Commission:—Held, that the Court of Review could not supersede the commission, on a petition for costs, and a cross petition for a new trial. The Lord Chancellor has still a substantive control in cases of superseas, or annulling a fiat, although the question may not come before him by way of appeal. *Ex parte Keys*, 1834. 3 *Dea. & Chit.* 263; *S. C.* 1 *Mont. & Ayr.* 226.

The Court will not interfere, on

the application of the assignees, to sanction an arrangement made by them for the satisfaction of a claim of the bankrupt's wife. The assignees must use their own discretion. *Ex parte James*, 1833. 3 Dea. & Chit. 290.

Under the 6 Geo. 4. c. 16. s. 96, the Court have a general power, upon petition, to direct the proceedings to be entered of record. *Ex parte Thomas*, 1833. 3 Dea. & Chit. 292.

The Court will not interfere between two adverse claimants, one claiming as equitable mortgagee, and the other under a prior lease made by the bankrupt of the same property, when the estate of the bankrupt has no interest in the question. *Ex parte Royds*, 1833. 3 Dea. & Chit. 294.

Quære, Whether the Court can direct the amendment of a fiat, without the approbation of the Lord Chancellor; and whether this can be done now, after adjudication? *Sem-ble*, that the name of one of the Commissioners, who has not acted under the fiat, being mis-spelt, is not such an error as to require amendment. *Re Bell*, 1833. 3 Dea. & Chit. 326.

A. in France employs *B.* in England to sell wines by commission, as well as to purchase other wines on *A.*'s account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold by *B.* in his own name; part of the

wines consigned by *A.* were in the dock warehouses standing in *B.*'s name, and part formed one indiscriminate stock in *B.*'s cellar. *A.* closes the connection with *B.*, and requires him to deliver up all the wines, but *B.* neglects to comply with this requisition, and shortly afterwards becomes bankrupt :—Held, that the Court had jurisdiction to order the assignees of *B.* to deliver up those wines to *A.* *Ex parte Moldaut*, 1833. 3 Dea. & Chit. 351.

The Court of Review has jurisdiction to entertain a petition against the allowance made by the Commissioner to the official assignee. But the Court will not review the decision of the Commissioner as to the quantum of the allowance, unless it appears that he has proceeded on an erroneous principle. [Dissent. Sir *J. Cross*.] *Ex parte Tiplady, re Dickenson*, 1834. 3 Dea. & Chit. 570; S. C. 1 M. & A. 161.

A. and *B.* sue out a commission as solicitors to the petitioning creditor, and the assignees afterwards appoint *C.* to act as solicitor, but it is agreed between him and *A.* and *B.*, with the privity of the assignees, that all three shall jointly act as solicitors, and share the profits, and the assignees afterwards recognize the acting of *A.* and *B.* as such joint solicitors. Held, 1st, That this amounted to a retainer by the assignees of *A.* and *B.* as joint solicitors with *C.* 2dly, That the Court of Review has jurisdiction on the

petition of *A.* and *B.* (*C.* having been served with it,) to enforce the payment, by the assignees, of the solicitors' bill of costs. 3dly, That the assignees were not liable for the payment of such costs, whether they had funds in their hands or not. *Ex parte Hammond, re Wooding*, 1834. 3 Dea. & Chit. 626; *S. C.* 1 M. & A. 328.

After a special case has once been certified by the chief judge, the Court has no jurisdiction to disallow it. *Ex parte Hawley*, 1834. 3 Dea. & Chit. 655.

Upon a sale of the bankrupt's mortgaged property, made under the general order, the Court of Review has jurisdiction to enforce a specific performance of the contract by the purchaser. *Ex parte Sidebotham*, 3 Dea. & Chit. 818; *S. C.* 1 Mont. & Ayr. 655.

A purchaser, who, with full knowledge of certain objections to the title, grants a lease of the property to a third party, must be taken to have waived the objections to the title. *Ibid.*

The Court has jurisdiction to restrain the bankrupt from bringing actions to upset his commission. After twenty-two years, and acquiescence, the Court will restrain the bankrupt from bringing actions against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 283.

The Court has jurisdiction to restrain any action brought by the

bankrupt in any Court. 1 Mont. & Ayr. 290.

Long acquiescence is enough to refuse to supersede on the application of the bankrupt, but not alone enough to enable the Court to restrain him from bringing actions. *Ibid.* 297.

On an application of a tenant of the assignees, a reference was made to the Commissioner, who reported the rent should be reduced, which was done. On the application of some creditors, one of whom offered higher rent, the Court refused to interfere. *Ex parte Begnis, re Chambers*, 1834. 1 Mont. & Ayr. 277.

Quære, Can the Court of Review entertain a petition of appeal, from the rejection by the Commissioner of a proof of debt on a question of fact?

An objection that the Court of Review has no jurisdiction, cannot be taken on appeal, if not taken below. *Ex parte Turner, re Mackenzie*, 1834. 1 M. & Ayr. 357.

If a bill filed by assignees be dismissed with costs, the Lord Chancellor has no jurisdiction to order the costs to be retained by the assignees out of the bankrupt's estate. *Turner v. Hibbert*, 1834. 1 Mont. & Ayr. 243. But see *Ex parte Keys*, 3 Dea. & C. 263; *S. C.* 1 M. & A. 226.

A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption, in case any

partner wished to dispose of his share; a partner deposited an attested copy of the lease, in order to give an equitable mortgage on his share to a stranger. Held, the Court could not make the usual order for sale, &c., as the partnership accounts must first be taken, which the Court has no jurisdiction to do, and the case was not free from doubt. [*Cross, J., dissent.*] *Ex parte Broadbent, re Barron*, 1834. 1 Mont. & Ayr. 635.

The Court has not jurisdiction to order property alleged to have been given as a fraudulent preference to be delivered up because the party has claimed. *Ex parte Dobson, re Thompson*, 1834. 1 Mont. & Ayr. 666.

A stranger to the commission obtained an assignment of the creditors' proofs, and therewith bought part of the bankrupt estate from the assignees. Held, the Court had no jurisdiction to set aside the purchase. [*Cross, J., dissent.*] *Ex parte Holder*, 1834. 1 Mont. & Ayr. 518.

The Court can reverse the decision of a Subdivision Court on a matter of fact, as to expunging a proof,—that not being within sect. 30 of 1 & 2 W. 4. c. 56. *Ex parte Baldwin, re Smith*, 1834. 1 Mont. & Ayr. 615.

Quære, Whether the Court has jurisdiction over the executor of an assignee? *Ex parte Turville, re Miller*, 1834. 1 Mont. & Ayr. 686.

The Court of Review will stay

the insertion of the advertisement in the Gazette. *Ex parte Lavender*, 1834. 1 Mont. & Ayr. 699.

Summary Exercise of.

The Court will only exercise a summary jurisdiction over an attorney, when he is acting in the character of an officer of the Court, and not in an ordinary case between attorney and client. *Ex parte Ball*, 1833. 3 Dea. & Chit. 116.

Where attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate. But if the attorney committed fraud in receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officers, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct. The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to show cause why he should not pay over the money. *Re Bonner*, 1833. 4 Barn. & Adol. 811.

LACHES.

After an order for sale obtained by an equitable mortgagee, if the assignees delay the sale, *semble*, that the

course is not to present a fresh petition for a sale, but to prosecute the former order. *Ex parte Robinson*, 1833. 3 Dea. & Chit. 103.

Where a creditor delayed proving her debt, until after a dividend had been declared, having relied upon the promise of the assignee to inform her of the progress of the commission, which he failed to do:—An order was made, that the creditor might prove her debt within a month, and that the payment of the dividend should be suspended in the meantime. *Ex parte Colton*, 1833. 3 Dea. & Chit. 194.

When the omission to prove a debt proceeds from a creditor's own laches, the Court will not order a dividend to be stayed until his petition to prove can be heard. *Ex parte Brees*, 1833. 3 Dea. & Chit. 283.

Although a fiat is issued for the purpose of defeating an action brought by a creditor against the bankrupt for the recovery of his debt, yet where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the Court will dismiss the petition. *Ex parte Mills, re Colman*, 1834. 3 Dea. & Chit. 606; S. C. 1 M. & A. 310.

A creditor cannot petition to supersede, who has lain by twelve months after the issuing of the fiat, without assigning some good reason for the delay. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 Mont. & Ayr. 405.

Creditors may petition to tax the

solicitor's bill though paid, the assignees having been guilty of dereliction of duty, in not filing the bills with the proceedings. *Ex parte Castle, re Payne*, 1834. 1 Mont. & Ayr. 665.

LANDLORD AND TENANT.

See also LEASE.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency; although occasioned by the payment of the rent. *Ex parte Cocks*, 1833. 3 Dea. & Chit. 8.

The bankrupt agreed in writing to take a lease of a manufactory for a term of years, and the landlord agreed to erect at his own expense certain buildings, upon the bankrupt paying as an additional rent 7*l.* 10*s.* per cent. upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt on the verbal assurance of the landlord that the bankrupt might deduct the amount expended from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum which the bankrupt had expended on the buildings:—Held, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuance of the tenancy which the assignees had themselves repudiated, they had no lien on the premises for the money expended by

the bankrupt. *Ex parte Ladd, re Ryland*, 1834. 3 Dea. & Chit. 647.

Where a landlord agrees to grant a lease to *A.*, his executors, administrators, and assigns, upon certain conditions, and *A.* assigns his interest in the contract to *B.*, and then becomes bankrupt, *B.*, on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and his right is not affected by a proviso, that in case of the bankruptcy of *A.* the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of *A.*'s estate. *Morgan v. Rhodes*, 1834. 1 Mylne & Keen, 435.

In replevin the defendant avowed for rent in arrear from one *J. M.*, and also claimed the goods as being the property of himself and others, as assignees of *J. M.*, against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record, the Court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Semble*, that pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant, founded on his demand for rent. *Emery v.*

Mucklow, 1834. 4 Moore & Sco. 263; S. C. 10 Bing. 401.

A steam engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in 6 Geo. 4. c. 16. s. 72.: nor had the bankrupt the actual or apparent ownership. *Coombs v. Beaumont*, 1833. 5 Barn. & Adol. 72.

LAPSE OF TIME.

An order was refused to tax a messenger's bill which had been paid five years ago, where there was no recent discovery of any fraudulent charge contained in it. *Ex parte Willment*, 1833. 3 Dea. & Ch. 364; S. C. 1 M. & A. 45.

LEASE.

A., before his bankruptcy, agrees to take a lease of a cotton mill, and enters into possession. After his bankruptcy, one of his assignees takes possession, and agrees to accept the lease, a draft of which was sent to the assignees containing covenants personally binding on them, and one in particular to prevent them from assigning, without the licence of the lessor. Held, that the assignees were not bound to accept of such a lease; and even if they were, that the Court of Review had no jurisdiction to compel

a specific performance of the agreement. *Ex parte Lucas*, 1833. 3 Dea. & Chit. 144; S. C. 1 Mont. & Ayr. 93.

The bankrupt agreed, in writing, to take a lease of a manufactory for a term of years, and the landlord agreed to erect, at his own expense, certain buildings, upon the bankrupt paying as an additional rent 7*l.* 10*s.* per cent. upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt, on the verbal assurance of the landlord that the bankrupt might deduct the expenses from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum which the bankrupt had expended on the buildings. Held, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by the bankrupt. *Ex parte Ladd, re Ryland*, 1834. 3 Dea. & Chit. 647.

An agreement for a lease is not annulled by the bankruptcy of the intended lessee. *Morgan v. Rhodes*, 1834. 1 Mont. & Ayr. 214.

An agreement for a lease is not annulled by the insolvency of the intended lessor, 1833. *Crosby v. Tooke*, 1 Mont. & Ayr. 215, n.

On an application of a tenant of

the assignees, a reference was made to the Commissioner, who reported the rent should be reduced, which was done. On the application of some creditors, one of whom offered higher rent, the Court refused to interfere. *Ex parte De Begnis, re Chambers*, 1834. 1 Mont. & Ayr. 277.

LEAVE TO BID.

Before a mortgagee, with a power of sale, can apply for leave to bid, he must waive his power of sale, and come before the Court in his simple character of mortgagee. *Ex parte Davis, re Hagley*, 1833. 3 Dea. & Chit. 504; S. C. 1 Mont. & Ayr. 89.

Although it is the usual and the prudent practice for a mortgagee to apply to the Court for leave to bid, the Court will not rescind the sale where the mortgagee has purchased the property without such leave, if the purchase has been made by him *bond fide*. *Ex parte Ashley, re Bell*, 1833. 3 Dea. & Chit. 510; S. C. 1 Mont. & Ayr. 82.

Order refused for an assignee to bid for the bankrupt's property, although the assignee obtained the consent of a meeting of the creditors, such meeting having been only attended by half in value of the creditors. *Ex parte Beaumont, re Edmonston*, 1834. 3 Dea. & Chit. 549; S. C. 1 Mont. & Ayr. 304.

A mortgagee having bid at the sale of the mortgaged property, and become the purchaser, without hav-

ing previously obtained an order for leave to bid, the Court granted him an order *nunc pro tunc*. *Ex parte Pedder, re Hardwen*, 1834. 3 Dea. & Chit. 622; S. C. 1 Mont. & Ayr. 327.

LENGTH OF TIME.

The time for the presenting a petition for a re-hearing in bankruptcy, is not limited to six months, nor need such petition state the grounds of the application. *Ex parte Greenwood*, 1833. 3 Deac. & Chit. 398; S. C. 1 Mont. & Ayr. 65.

Where nearly six years had elapsed since the solicitor's bill of costs had been taxed by the Commissioners, and the assignee was a party to that taxation, and to the subsequent payments in discharge of the bills, the Court refused, on his application, to refer them for re-taxation. *Ex parte Hutchinson, re Freeman*, 1834. 3 Dea. & Chit. 829.

The Court has jurisdiction to restrain the bankrupt from bringing actions to upset his commission. After twenty-two years, and acquiescence, the Court will restrain the bankrupt from bringing actions against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 283.

Long acquiescence is enough to refuse to supersede, on the application of the bankrupt, but not alone enough to enable the Court to restrain him from bringing actions. *Id.* 297.

LESSOR AND LESSEE.

It is no defence at law to an action on an indenture of lease, by the trustee of a party who has become bankrupt, that the defendants, the lessees, have performed their covenants with assignees of the *cestui que trust*. *Britton v. Britton*, 1834. 4 Tyr. 473.

LIEN.

A. procures goods, which he agrees with *B.* and *C.* shall be shipped on the joint adventure of the three, and then draws bills on *B.* and *C.* for the amount of the costs of the goods, which they accept, *A.* engaging to renew the bills until the return proceeds for the goods are received. *B.* and *C.* manage the shipment, and direct the consignee to forward the account of the return sales to themselves. *A.* then applies to *D.* to discount two of these bills, and, to induce him to do so, undertakes that the proceeds of the goods shall be applied in liquidation of the bills; which undertaking *D.*, after discounting the bills, communicated to *B.* and *C.* All the parties became bankrupt, and part of the return proceeds came to the hands of the assignee of *B.* and *C.*:—Held, that the proceeds were clothed with a trust for the payment of the bills, and that the assignees of *B.* and *C.* were bound to pay over such proceeds to the assignees of *D.* *Ex parte Copeland*, 1833. 3 Dea. & Chit. 199; S. P. *Ex parte Prescott*, *id.* 218; S. C. 1 Mont. & Ayr. 316.

A. supplies goods at his own cost to *B.* and *C.*, which it is agreed shall be shipped on the joint account of the three, and that *A.* shall draw bills on *B.* and *C.* on account of the return proceeds, he undertaking to renew the bills until funds came round so as to keep *B.* and *C.* out of cash advances. *B.* and *C.* accept the bills, and consign the goods to their correspondent abroad, with directions to transmit the account of sales and the proceeds to themselves. *A.* discounts the bills with parties *who have no knowledge of the bills being drawn on account of the joint shipment, and are not made acquainted with that circumstance* until after the respective bankruptcies of *A.* and of *B.* and *C.*:—Held, that the bill-holders have nevertheless a lien on the return proceeds of the shipment which come to the hands of the assignees of *A.*, *B.*, and *C.*, subsequently to their bankruptcy. [Sir *J. Cross* dubit.] *Ex parte Prescott*, 1854. 3 Dea. & Chit. 218; *S. C.* 1 Mont. & Ayr. 316.

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account; the intestate died in 1801, and a commission issued against the bankers in 1810, notwithstanding which the same partner continued to receive the dividends and pay them to the intestate's widow, up to the period of his own death, which happened in 1822; some time after

which the assignees of the banker claimed a lien on the debenture for a debt due from the intestate to the banking house:—Held, that after so long an abandonment of any claim of lien the assignees could not now support such claim, and that the debenture also could not be considered as having been left in the order and disposition of the bankers, having been deposited in the nature of a trust. *Ex parte Douglas*, 1833. 3 Dea. & Chit. 310.

The managing owner of a ship chartered by the East India Company receives the warrants for the freight, and pays them into a banker's, in his own name, drawing checks from time to time for various sums out of the proceeds, part of which are applied for the use of the ship, and part for other purposes:—Held, that the other part-owners have no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors. [Sir *J. Cross*, dub.] *Ex parte Gribble*, 1833. 3 Dea. & Chit. 339.

The bankrupt agreed in writing to take a lease of a manufactory for a term of years, and the landlord agreed to erect at his own expense certain buildings, upon the bankrupt paying, as an additional rent, 7*l.* 10*s.* per cent. upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt on the verbal assurance of the landlord, that the bankrupt might deduct the amount expended from

the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord unless he allowed them the sum which the bankrupt had expended on the buildings:—Held, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuance of the tenancy which the assignees had themselves repudiated, they had no lien on the premises for the money expended by the bankrupt. *Ex parte Ladd v. Ryland*, 1834. 3 Dea. & Chit. 647.

LIVERY-STABLE KEEPER.

R., a livery-stable keeper, bought provender, and sold it to his customers and any one who applied for it, “as is done in all livery-stables”:—Held a sufficient trading to subject him to the bankrupt laws. *Cannan v. Dennew*, 1833. 10 Bingh. 292; *S. C.* 3 Moore & Sco. 761.

LOCUS STANDI IN CURIA.

To support an objection to the hearing of a petition on the ground of the costs not having been paid by the petitioner, as directed by a former order, there must have been a personal demand of the costs. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; *S. C.* 1 Mont. & Ayr. 405.

An application that the officer of the Court may be directed to review his certificate as to the taxation of costs, may be made by motion. It is not an objection to such appli-

cation, that the amount of the taxed costs has not been paid into Court, although it may be proper to make such payment one of the terms of the order for re-taxation. *Ex parte Richardson, re Consett*, 1834. 3 Dea. & Chit. 735; *S. C.* 1 Mont. & Ayr. 377.

LORD CHANCELLOR.

Where, on a petition to supersede, the Lord Chancellor had directed the trial of an issue, and the verdict was in favour of the commission:—Held, that the Court of Review could not supersede the commission on a petition for costs, and a cross petition for a new trial. The Lord Chancellor has still a substantive control in cases of supersedeas or annulling a fiat, although the question may not come before him by way of appeal. *Ex parte Keys*, 1834. 3 Dea. & Chit. 263; *S. C.* 1 Mont. & Ayr. 226.

LOST DEEDS, &c.

Where a warrant is issued against a bankrupt for non-compliance with an order of the Court, and the warrant is lost, the Court will renew the warrant or grant a copy of it as a matter of course. *Ex parte Giles*, 1834. 3 Dea. & Chit. 620.

Where bills of exchange proved under a fiat have been lost by the creditor, and he therefore cannot produce them for the purpose of receiving his dividends, and an application to the Court of Review becomes necessary to enable him to

receive the dividends, the creditor must pay the costs of the application. *Ex parte Trust, re Hartsinck*, 3 Dea. & Chit. 750.

LYING IN PRISON.

Petitioning to enlarge the time to surrender, is a slight act of acquiescence; but lying in prison under a commitment by Commissioners, is a strong act of acquiescence. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 298.

MACHINERY.

See also **FIXTURES—STEAM ENGINES.**

In 1797, premises in Lancashire described as "land, a dwelling-house, machine-house, and other buildings and erections," were conveyed in fee to one of several partners. The conveyance stated them to be then in the possession of that partner and another of his then partners. Machinery and utensils were afterwards placed thereon by the firm for the purpose of carrying on the business of calico printers. The machinery and utensils were firmly fixed to the freehold, yet in such a manner that they might be easily removed without material injury to themselves or the buildings. In that part of the country similar articles so fixed are commonly bought, sold, and removed, without treating them as fixtures. In taking stock yearly between 1804 and 1825, the buildings and land were valued and classed separately from the machinery and

fixtures, but the whole was always dealt with and considered as partnership property. In 1828, two of the partners (then seised in fee of the freehold land and buildings under a conveyance, not mentioning machinery or fixtures) mortgaged them for a term; "and also the steam-engine, mill geering, heavy geer, millwright work, fixed machinery, and other matter and things standing and being in or upon the thereby demised buildings, works, and premises which in any manner constitute fixtures and appendages to the freehold of the same or any part thereof." They remained in possession, and carried on the works till 1829, when they compounded with their creditors, and afterwards, till they became bankrupts. In April 1831, their assignees sold and removed the machinery and utensils, except two steam-engines with the first motion and main shafts attached to them, and two water-wheels which supplied power to the rest:—Held, 1st, That the machinery and utensils so removed having been affixed to the inheritance for the purpose of trade only, in a place where as such they would have commonly been removed, and being, in fact, removeable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only, which passed to the assignees of the bankrupt. 2ndly, That the mortgage deed was only intended to pass that part of the machinery which from

the circumstances of its erection necessarily became part of the freehold. *Trappes v. Harter*, 1833. 3 Tyrw. 603; S. C. 2 Crompt. & Mee. 153.

MARRIAGE SETTLEMENT.

A bankrupt had, on his marriage, entered into a bond to trustees to pay them 1200*l.*, upon trust for himself for life, if he should not become a bankrupt, with remainder to his intended wife for life, with the usual limitations to children; and on the faith of the bond he was permitted to apply to his own use his wife's marriage portion, amounting to 150*l.*:—Held, that the trustees were entitled to prove for the 1200*l.*, the dividends to be invested in stock, the dividend of which was to be subject to the payment of interest to the wife on the 150*l.*, and the remainder to the bankrupt's creditors for his life, and after his death upon the trusts of the bond. *Ex parte Shute*, 1833. 3 Dea. & Chit. 1.

By the terms of the bankrupt's marriage settlement, the wife's property was settled upon her in case of the bankrupt's death, or the parties being divorced, but the bankrupt was entitled to the interest for his life, and in case he survived his wife, he was to have a certain share of this property:—Held, that the wife might, in the name of her trustee, make such proof as the Commissioners might think she was entitled to. *Ex parte Saunders*, 1834. 3 Dea. & Chit. 568.

The bankrupt, having received 550*l.* on his marriage, gave a bond to trustees, conditioned for the payment of 1100*l.* “on receiving notice from the trustees:”—Held, that although no notice was given to the bankrupt before his bankruptcy, this was nevertheless a contingent debt, proveable within the provisions of the 56th section of 6 Geo. 4. c. 16. *Ex parte Hooper, re West*, 1834. 3 Dea. & Chit. 655.

A trader, on his marriage, received a fortune of 5000*l.* with his wife, and settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent; and it was provided, that if he should survive his wife, and the issue of the marriage should fail, and he should then be or should have been a bankrupt, fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the 5000*l.* was settled, but the whole of the settled fund was the husband's property, and it did not appear from any of the expressions in the settlement what was the consideration for the provision as to the fifteen sixty-sixths of the stock:—Held, that the limitations over, in the event of the bankruptcy of the husband, were good as to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder.

Lester v. Garland, 1832. 5 Sim. 205.

MASTER'S REPORT.

A party objecting to the Master's Report, should either present a petition to except to it, or give notice to the other side of the nature of the objection. *Ex parte Mallard*, 1833. 3 Dea. & Chit. 243.

MEETING AND CONSENT OF CREDITORS.

See also CONSENT.

Order refused for an assignee to bid for the bankrupt's property, although the assignee obtained the consent of a meeting of the creditors, such meeting having been only attended by half in value of the creditors. *Ex parte Beaumont, re Edmonston*, 1834. 3 Dea. & Ch. 549; S. C. 1 M. & A. 304.

MEMORANDA.

Of calls within the Bar, 3 Dea. & Chit. 251.

Of Deposit.—See **EQUITABLE MORTGAGE.**

MESSENGER.

An order was refused to tax a messenger's bill which had been paid five years ago, where there was no recent discovery of any fraudulent charge contained in it. *Ex parte Willment*, 1833. 3 Dea. & Chit. 364; S. C. 1 Mont. & Ayr. 45.

In an action by a messenger to

a commission of bankrupt, against the assignee appointed under 6 Geo. 4. c. 16, to recover the costs of advertising a meeting of creditors, and of hiring a room for them to assemble in, it is sufficient to prove the plaintiff's appointment, and that the expenses incurred by him were reasonable, without proving express employment or recognition of him as messenger by the assignee. *Hamber v. Parzer*, 1833. 4 Tyrw. 41; S. C. 2 Crompt. & Mees. 209.

MISDESCRIPTION.

Where a creditor petitioned to annul the fiat on the ground of the misdescription of the bankrupt, without any intention, on his part, to issue another fiat, and the misdescription was so slight that no creditor was deceived by it, the Court dismissed the petition. *Ex parte Mills, re Colman*, 1834. 3 Dea. & Ch. 606; S. C. 1 M. & A. 310.

Docket papers and the fiat cannot be amended by inserting the bankrupt's place of business. *Quære*, If the docket be correct, and the fiat incorrect through the error of the office? *Ex parte Graves, re Wyatt*, 1834. 1 M. & A. 315.

MOTION.

An application for a re-hearing must be by petition, and not by motion. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 70.

A formal objection to a notice of motion is waived by the party ap-

pearing, and requesting further time to oppose it. *Ex parte Morland*, 1833. 3 Dea. & Chit. 248.

Before a motion is made that the petition of the bankrupt for a supersedeas shall be dismissed, on the ground of his being out of the jurisdiction of the Court, the respondent should serve the bankrupt's agent with notice of the motion, having previously obtained an order that service on the agent shall be good service. *Ex parte Drake*, 1833. 3 Dea. & Chit. 284.

An application that the officer of the Court may be directed to review his certificate as to the taxation of costs, may be made by motion. It is not an objection to such application, that the amount of the taxed costs has not been paid into Court, though it may be proper to make such payment one of the terms of the order for re-taxation. *Ex parte Richardson, re Consitt*, 1834. 3 Dea. & Chit. 735; *S. C.* 1 M. & A. 377.

MORTGAGE.

See also EQUITABLE MORTGAGE.

A reserved bidding allowed to assignees on the sale of an estate, which had been mortgaged by the bankrupt. *Ex parte Ellis*, 1833. 3 Dea. & Chit. 297.

A legal mortgage of an equitable estate is within Lord Loughborough's General Order. *Ex parte Aple, re Friend*, 1834. 1 M. & A. 621.

In 1797 premises in Lancashire,

described as "land, a dwelling-house, machine-house, and other buildings and erections," were conveyed in fee to one of several parties. The conveyance stated them to be then in the possession of that partner, and another of his then partners. Machinery and utensils were afterwards placed thereon by the firm for the purpose of carrying on the business of calico printers. The machinery and utensils were firmly fixed to the freehold, yet in such a manner that they might be easily removed without material injury to themselves or the buildings. In that part of the country similar articles so fixed are commonly bought, sold, and removed without treating them as fixtures. In taking stock yearly between 1804 and 1805, the buildings and land were valued and classed separately from the machinery and fixtures, but the whole was always dealt with and considered as partnership property. In 1828, two of the partners (then seised in fee of the freehold land and buildings under a conveyance not mentioning machinery as fixtures) mortgaged them for a term, "and also the steam-engine, mill geering, heavy gear, millwright work, fixed machinery, and other matters and things standing and being in or upon the thereby demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same, or any part thereof." They remained in pos-

session and carried on the works till 1829, when they compounded with their creditors, and afterwards, till they became bankrupts. In April 1831, their assignees sold and removed the machinery and utensils, except two steam-engines with the first motion and main shafts attached to them, and also two water-wheels which supplied power to the rest :— Held, 1st. That the machinery and utensils so removed, having been affixed to the inheritance for the purpose of trade only, in a place where as such they would have commonly been removed, and being in fact removable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only, which passed to the assignees of the bankrupts. 2dly. That the mortgage deed was only intended to pass that part of the machinery which, from the circumstances of its erection, necessarily became part of the freehold. *Trappes v. Harter*, 1833. 3 Tyrw. 603; S. C. 2 Crompt. & Mees. 153.

Where the lessee for years of a house, being also possessed of the fixtures therein by separate purchase, mortgaged his term with the fixtures, and afterwards became bankrupt :— Held, that his assignee who removed and converted them was liable in trover by the mortgagee to pay the value of them while fixed on the demised premises. *Boydell v. M'Michael*, 1834. 3 Tyrw. 974; S. C. 1 Crompt. Mees., & Rosc. 177.

MORTGAGEE.

An assignee, who was also a mortgagee of the bankrupt's freehold property, having purchased it for himself when it was put up for sale, the estate was ordered to be resold, subject to any claim of the assignee by virtue of his mortgage. *Ex parte Turvill*, 1833. 3 Dea. & Chit. 346.

Before a mortgagee with a power of sale can apply for leave to bid, he must waive his power of sale, and come before the Court in the simple character of mortgagee. *Ex parte Davis, re Hagley*, 1833. 3 Dea. & Chit. 504; 1 M. & A. 89.

Although it is the usual and the prudent practice for a mortgagee to apply to the Court for leave to bid, the Court will not rescind the sale where the mortgagee has purchased the property without such leave, if the purchase had been made by him *bonâ fide*. *Ex parte Ashby, re Bell*, 1833. 3 Dea. & Chit. 510; S. C. 1 M. & A. 82.

A mortgagee having bid at the sale of the mortgaged property, and become the purchaser without having previously obtained an order for him to bid, the Court granted him an order *nunc pro tunc*. *Ex parte Pedder, re Hadwen*, 1834. 3 Dea. & Chit. 622; S. C. 1 M. & A. 327.

The Court will not exempt a mortgagee who bids from paying a deposit. *Ex parte Tatham, re Shoppard*, 1833. 1 M. & A. 335.

MULTIFARIOUSNESS.

See also PETITION—FORM.

In bankruptcy the objection of multifariousness is not considered as conclusive. *Ex parte Brown, re Lloyd*, 1833. 3 Dea. & Chit. 496.

NEW CHOICE OF ASSIGNEES.

See also ASSIGNEES, CHOICE OF.

Upon a new choice of assignees there is no necessity to vacate the assignment under a commission issued prior to 1 & 2 Will. 4. c. 56. *Smith v. De Tastet*, 1834. 1 Mont. & Ayr. 370.

NEW TRIAL.

On a petition by a creditor to supersede, on the ground of concert, before the passing of the Bankruptcy Court Act, the Lord Chancellor had directed an issue, which was found in favour of the commission. The assignees then presented a petition for their costs, and the creditor a petition for a new trial. Upon the hearing of these parties, the Court of Review being satisfied of the fact of concert, though no new trial was necessary, ordered the commission to be superseded. [Dissent. Sir J. Cross.] *Ex parte Harwood*, 1833. 3 Dea. & Chit. 252. But see the next case, *id.* 263.

In a case within the 92d section of the Bankrupt Act, (6 G. 4. c. 16.) where the assignees went into evidence of the trading, in consequence of a notice to dispute, without advert- ing to the section, or relying upon

the depositions ; and having failed to establish the trading, were nonsuited, the Court refused to set the nonsuit aside. *Johnson v. Piper*, 1833. 2 Nev. & Man. 672.

NOTICE.

Where a petition is permitted to stand over, to enable a petitioner to be prepared with an affidavit of service, the respondent must have notice of the day when the petition is to be brought on. *Ex parte Mucklow*, 1833. 3 Dea. & Chit. 25.

Notice must be given for time to answer affidavits, unless the motion is made when the petition is called on. *Ex parte Binns*, 1833. 3 Dea. & Ch. 189.

A formal objection to a notice of motion is waived by the party appearing and requesting further time to oppose it. *Ex parte Morland*, 1833. 3 Dea. & Chit. 248.

Before a motion is made that the petition of the bankrupt for a super- sedes shall be dismissed, on the ground of his being out of the juris- diction of the Court, the respondent should serve the bankrupt's agent with notice of the motion, having previously obtained an order that ser- vice on the agent shall be good ser- vice. *Ex parte Drake*, 1833. 3 Dea. & Chit. 284.

The bankrupt having received 550*l.* with his wife on marriage, gave bond to trustees for payment of 1100*l.* "on receiving notice from the trus- tees :"—Held, that although no notice

was given to the bankrupt before his bankruptcy, it was nevertheless a contingent debt proveable within 6 Geo. 4. c. 16. s. 56. *Ex parte Hooper, re West*, 1834. 3 Dea. & Chit. 655.

Where shares of an insurance company are held in the name of the bankrupt as trustee, they are not in his reputed ownership. What is notice to the office? *Ex parte Watkins, re Kidder*, 1834. 1 Mont. & A. 689.

S. having advanced money to M., received from him, by way of security, an assignment of his equitable life interest in certain stock standing in the names of three trustees, under a marriage settlement, and in a mortgage vested in the same trustees. The solvency of M. becoming doubted, one of the trustees and a relation of S. spoke to him on the subject, when S. in the course of the conversation, and without any view of giving validity to the security he held, told him that he held the above-mentioned assignment as a security for his advances. M. having afterwards become bankrupt, Held, that this statement, though made to a person who was not acting trustee, sufficed to prevent the stock and mortgage from being in the order and disposition of M. at the time of his bankruptcy, and consequently from passing to his assignees. *Smith v. Smith*, 1833. 4 Tyrw. 52; S. C. 2 Crompt. & Mees. 231.

A judgment on a warrant of attorney is not within the protection of

1 Will. 4. c. 7. s. 7., and therefore is within the 108th section of 6 Geo. 4. c. 16. In assumpsit for money had and received against the sheriff to recover the proceeds of a sale under a fi. fa. issued upon a judgment not protected by 1 Will. 4. c. 7. s. 7. the plaintiff was held liable, where notice of an act of bankruptcy committed before the sale, and of a docket struck thereon, was given to him when the sale was nearly completed, after which he received the proceeds, and handed them over to the execution creditor. *Crossfield v. Stanley*, 1832. 1 Nev. & Man. 668; S. C. 4 Barn. & Adol. 87.

Upon the assignment of a simple contract debt, the assignor must be considered as having the order and disposition of the debt, with the consent of the true owner, until the debtor has notice of the assignment. Such debt will, therefore, pass to the assignees under a bankruptcy, by virtue of 6 Geo. 4. c. 16. s. 72., and to the assignees under the insolvent debtors' act, 7 Geo. 4. c. 57. s. 31. *Buck v. Lee*, 1834. 3 Nev. & Man. 580.

NOTICE OF DISHONOUR.

The holder of a bill of exchange falling due and being dishonoured after the bankruptcy of the drawer, is bound to use due diligence in giving notice to the bankrupt or his assignees of the dishonour of the bill. Therefore, where the bankrupt's house continued open in his

absence after his bankruptcy, the messenger being in possession during part of the time, and the bankrupt's wife or clerk during the other period of his absence:—Held, that the holder was at least bound to leave notice at the bankrupt's house. *Quære*, whether he was bound also to seek out the bankrupt's assignees, for the purpose of giving them notice? No such notice however is necessary, where there are no effects of the drawer in the hands of the acceptor during the currency of the bill. *Ex parte Johnson*, 1834. 3 Dea. & Chit. 433; S. C. 1 Mont. & Ayr. 622.

OFFICER OF COURT.

The Court will only exercise a summary jurisdiction over an attorney, when he is acting in the character of an officer of the Court, and not in an ordinary case between attorney and client. *Ex parte Bull*, 1833. 3 Dea. & Chit. 116.

OFFICIAL ASSIGNEE.

On a petition to supersede by consent of creditors, the official assignee need not sign the petition. *Ex parte Parker*, 1833. 3 Dea. & Chit. 112.

An official assignee having no funds in hand, cannot be compelled to join in a suit in equity, with the other assignees, without being indemnified as to the costs. But if he improperly

refuses to join in such suit, he may be made a defendant, and then incur the risk of having to pay his own costs. *Ex parte Evans*, 1834. 3 Dea. & Chit. 470; S. C. 1 M. & A. 355.

The Court of Review has jurisdiction to entertain a petition against the allowance made by the Commissioner to the official assignee. But the Court will not review the decision of the Commissioner, as to the question of the allowance, unless it appears that he has proceeded on an erroneous principle. [Dissent. Sir J. Cross.] *Ex parte Tiplady, re Dickenson*, 1834. 3 Dea. & Chit. 570; S. C. 1 Mont. & Ayr. 161.

If an official assignee be included in an order for payment of costs, the order may be enforced against him alone. *Ex parte Murray, re Smith*, 1834. 1 Mont. & Ayr. 475.

An action for money had and received, lies against an official assignee appointed by the Court of Review, to recover money received by him while acting under a void commission, and not paid into the Bank of England as directed by 1 & 2 Will. 4. c. 56. s. 22.

Quære. Whether the bankrupt, who procured the appointment of the defendant to the office of assignee, could afterwards charge him with having received monies of the bankrupt to his, the bankrupt's use—*Sem-ble* not. *Munk v. Clarke*, 1833. 3 Moore & Sco. 463.

OPENING FIAT.

Attendance of petitioning creditor dispensed with, under the circumstances, at the opening of the fiat. *Re Polton*, 1834. 3 Dea. & Chit. 688.

ORDER.

After an order for sale obtained by an equitable mortgagee, if the assignees delay the sale, *semble*, that the course is not to present a fresh petition for a sale, but to prosecute the former order. *Ex parte Robinson*, 1833. 3 Dea. & Chit. 103.

A creditor tenders a proof for 3,500*l.*, which the Commissioners reject *in toto*, and, after presenting a petition against their decision, an order is made by consent that he shall prove for 500*l.* The Court would not grant him costs out of the estate, but ordered each party to pay his own costs. *Ex parte Waterhouse*, 1833. 3 Dea. & Chit. 108.

A previous order of the Vice-Chancellor, which had been omitted to be drawn up, ordered to be entered *nunc pro tunc*, if the Vice-Chancellor should think fit. *Ex parte Lewis*, 1833. 3 Dea. & Chit. 198.

A libellous handbill, published by the bankrupt against the assignees and the solicitor to the commission, is not a sufficient ground for discharging an order which allowed the bankrupt to petition *in formâ pauperis*. *Ex parte Morland*, 1833. 3 Dea. & Chit. 248.

Where a party obtains an order

of the Lord Chancellor to hear an appeal on petition, instead of a special case, and the order is improperly obtained, the respondent must move to set it aside, and not wait to make his objection to the form of proceeding until the petition is called on for hearing. Whether the matter appealed against be one of law or fact, the Lord Chancellor will not determine before he hears the petition through. *Ex parte Keys*, 1834. 3 Dea. & Chit. 263; 1 Mont. & Ayr. 226.

To support an objection to the hearing of a petition, on the ground of the costs not having been paid by the petitioner, as directed by a former order, there must have been a personal demand of the costs. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

ORDER NUNC PRO TUNC.

See also ATTORNEY—ADMISSION.

A mortgagee having bid at the sale of the mortgaged property, and become the purchaser, without having previously obtained an order for him to bid, the Court granted him an order *nunc pro tunc*. *Ex parte Pedder, re Hadwen*, 1834. 3 Dea. & Chit. 622; S. C. 1 M. & A. 327.

PARTNERS, AND PART-OWNERS AND PARTNERSHIPS.

The bankrupt, who was in partnership with *W. P.*, borrowed various sums of him, by way of personal loan, and upon the dissolution of the

partnership purchased the stock in trade for a stipulated sum. *W. P.* made out an account, entitled "Mr. *H. P.*" (the bankrupt) "in account with *H.* and *W. P.*:"—Held, that *W. P.* had a good petitioning creditor's debt, notwithstanding this mode of entitling the account. *Ex parte Richardson*, 1833. 3 Dea. & Chit. 244.

The managing owner of a ship, chartered by the East India Company, receives the warrants for the freight, and pays them into a banker's, in his own name, drawing checks from time to time for various sums out of the proceeds, part of which are applied for the use of the ship, and part for other purposes:—Held, that the other part-owners have no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors. [Dub. Sir *J. Cross.*] *Ex parte Gribble*, 1833. 3 Dea. & Chit. 339.

A. lends *B.* money to enable him to commence a trade at five per cent. interest; after the loan, *B.* agrees to give *A.* one eighth of the annual profits by monthly payments, which offer *A.* accepts, and *B.* accordingly makes several monthly payments, for which *A.* gives *B.* receipts on account:—Held, that the balance of the principal and interest due from *B.* to *A.* was a good petitioning creditor's debt, not arising out of a partnership nor affected by usury. *Ex parte Briggs*, 1833. 3 Dea. & Chit. 367; S. C. 1 Mont. & Ayr. 46.

One of two partners accepts

bills for a previous partnership liability, after his co-partner has committed an act of bankruptcy:—Held, that these bills were, in the hands of a *bond fide* holder, proveable against the joint estate under a subsequent commission issued against both partners. *Ex parte Robinson*, 1833. 3 Dea. & Chit. 376; S. C. 1 Mont. & Ayr. 18.

B. is a partner with *A.* as nail manufacturers, and with *C.* as grocers. The firm of *B.* and *C.* advance monies to the firm of *A.* and *B.*:—Held, that as *B.* and *C.* were not liable for the debts of *A.* and *B.*, *B.* and *C.* could prove under a fiat issued against *A.* and *B.* *Ex parte Thompson, re Ecroyd*, 1834. 3 Dea. & Chit. 612; S. C. 1 M. & A. 312, 324.

A second fiat issued against one of several partners, after a previous fiat against the other partners, cannot now be directed to the same Commissioners as those named in the first fiat, under the 6 Geo. 4. c. 16. s. 17. but must be directed to the new Commissioners appointed under the 1 & 2 W. 4. c. 56. s. 14. *Ex parte Beague, re Schonswar*, 1834. 3 D. & C. 747; S. C. 1 M. & A. 445.

F., a partner in a banking-house, transferred bank stock belonging to a customer by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by *F.*, who was subsequently executed for other

forgeries. The other partners were ignorant of the transaction, but with common diligence could have known of it:—Held, the customer could maintain an action against the partners for money had and received. *Keating v. Marsh*, 1834. 1 Mont. & Ayr. 582; affirmed *id.* 592.

F., a partner in a banking-house, transferred bank stock belonging to a customer by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by *F.*, who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but with common diligence could have known of it. *Quære*, whether the customer can prove for the value under the commission. An action ordered to try whether the partners were indebted to the customer. *Ex parte Bolland, re Marsh*, 1834. 1 Mont. & Ayr. 570.

Proof by joint estate for fraudulent abstraction, when admissible. *Ex parte Turner, re Mackenzie*, 1833. 1 Mont. & Ayr. 54; affirmed *id.* 357.

A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption, in case any partner wished to dispose of his share; a partner deposited an attested copy of the lease in order to give an equitable mortgage on his share to a stranger:—Held, the Court could not make the usual or-

der for sale, &c. as the partnership accounts must first be taken, which this Court has no jurisdiction to do, and the case was not free from doubt. [*Cross, J.* dissenting.] *Ex parte Broadbent, re Borron*, 1834. 1 Mont. & A. 635.

Under a joint and separate fiat, the bankrupt's allowance is to be calculated on the amount of his separate estate, together with his share of the joint estate, not on the gross amount of the joint estate. *Ex parte Lomas, re Cooke*, 1834. 1 M. & A. 525.

A solvent partner may sue out a writ in the name of his co-partner, or, if bankrupt, in the names of his assignees as well as his own, in order to recover a debt due to the partnership. *Whitehead, v. Hughes*, 1833. 4 Tyr. 92.

PARTY TO SUIT.

An official assignee having no funds in hand, cannot be compelled to join in a suit in equity with the other assignees, without being indemnified as to the costs. But if he improperly refuses to join in such suit he may be made a defendant, and then incur the risk of having to pay his own costs. *Ex parte Evans*, 1834. 3 Dea. & Chit. 470; *S. C.* 1 Mont. & Ayr. 355.

PAUPER,

Leave to sue as.

A libellous handbill published by the bankrupt against the assignees and the solicitor to the commis-

sion, is not a sufficient ground for discharging an order which allowed the bankrupt to petition *in forma pauperis*. *Ex parte Morland*, 1833. 3 Dea. & Chit. 248.

PAYMENT.

One of the assignees having the sole charge of paying the dividends, pays the dividend of a creditor to a person who is not duly authorized to receive it. The two other assignees are equally responsible to the creditor for the amount of the dividend. *Ex parte Winnall*, 1833. 3 Dea. & Chit. 22.

Where nearly six years had elapsed since the solicitor's bill had been taxed by the Commissioners, and the assignee was a party to that taxation, and to the subsequent payments in discharge of the bills, the Court refused, on his application, to refer them for re-taxation. *Ex parte Hutchinson, re Freeman*, 1834. 3 Dea. & Chit. 829.

PAYMENT INTO COURT.

An application that the officer of the Court may be directed to review his certificate as to the taxation of costs, may be made by motion. It is not an objection to such application, that the amount of the taxed costs has not been paid into Court, though it may be proper to make such payment one of the terms of the order for re-taxation. *Ex parte Richardson, re Consett*, 1834. 3

Dea. & Chit. 735 ; S. C. 1 Mont. & Ayr. 377.

PETITION.

Generally

An application for a rehearing must be by petition and not by motion. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 70.

Where unfounded charges of corruption were brought against Commissioners by a petitioner who appeared to be the tool of the parties, the Court ordered the Commissioners their "costs, charges, and expenses," and suspended the order until the attorney for the petitioner should show cause why he should not personally pay the costs. *Ex parte Williams*, 1833. 3 Dea. & Ch. 103.

Creditors may petition to tax the solicitor's bill though paid, the assignees having been guilty of dereliction of duty in not filing the bills with the proceedings. *Ex parte Castle, re Payne*, 1834. 1 Mont. & Ayr. 665.

An application to be discharged from custody on the ground of the insufficiency of the Commissioners warrant, must be by petition. *Ex parte Jones*, 1834. 1 M. & A. 704.

Form.

A petition to except to a report is heard before a petition to confirm it, notwithstanding the latter petition stands first in the paper. The petition must specify the ex-

ceptions. The master should not draw conclusions of law, but leave the legal result to the Court. *Ex parte Cox*, and *Ex parte Smith*, 1833. 3 Dea. & Chit. 11.

A petition to stay the certificate, charging that the bankrupt admitted that he had lost 25*l.* in one sitting, is demurrable; it ought positively to allege the fact, and that the money was lost in one day. *Ex parte Crouch*, 1833. 3 Dea. & Chit. 17.

When a petition for rehearing states new facts, it should be in the nature of a supplemental petition, and the original petition should be set down for hearing at the same time. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 71.

In order to fix the executor of the petitioning creditor with costs, the petitioner must pray costs against him in his character of executor. *Ex parte Harwood*, 1833. 3 Dea. & Chit. 252.

The examination of the assignee before the Commissioner as to the sale of the property, was permitted to be read as evidence of the assignee's misconduct, although it did not pray a resale. *Ex parte Turvill*, 1833. 3 Dea. & Chit. 346.

The time for the presenting a petition for a rehearing in bankruptcy is not limited to six months, nor need such petition state the ground of the application. *Ex parte Greenwood*, 1833. 3 Dea. & Chit. 398; S. C. 1 Mont. & Ayr. 65.

In bankruptcy, the objection of

multifariousness is not considered as conclusive. *Ex parte Brown, re Lloyd*, 1833. 3 Dea. & Chit. 496.

Where a creditor petitions to annul a fiat after the bankrupt has obtained his certificate, there must be a distinct allegation of fraud against the bankrupt in the petition; it is not sufficient to state fraud in the affidavit. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

Advancing Petition.

Petition not served, cannot be advanced. *Ex parte Harding, re Barratt*, 1833. 1 Mont. & Ayr. 115.

Adjourning Petition.

On an application to adjourn the hearing of a petition for the purpose of answering affidavits filed in opposition, the Court will first hear the petition and affidavits read. *Ex parte Crouch*, 1833. 3 Dea. & Chit. 17.

Where a petition is permitted to stand over to enable the petitioner to be prepared with an affidavit of service, the respondent must have notice of the day when the petition is to be brought on. *Ex parte Mucklow*, 1833. 3 Dea. & Chit. 25.

The Court will not order a petition to stand over to enable a respondent to file affidavits in rejoinder, without first hearing the affidavits read, to see whether they require an answer. *Ex parte Todd*, 1833. 3 Dea. & Chit. 57.

Notice must be given of a mo-

tion for time to answer affidavits, unless the motion is made when the petition is called on. *Ex parte Binns*, 1833. 3 Dea. & Chit. 189; S. P. *Ex parte Grazebrook, Ibid.* 199.

Where a respondent takes a formal objection to a petition for want of parties, and the petition is for this cause ordered to stand over, the costs of the day are in the discretion of the Court. *Ex parte Thompson, re Ecroyd*, 1834. 3 Dea. & Chit. 612; S. C. 1 M. & A. 312—324.

Amending Petition.

When a petition has been half heard, it cannot be amended on payment of the common costs of the day. *Ex parte Turvill*, 1833. 3 Dea. & Chit. 346.

Dismissing Petition.

Before a motion is made that the petition of the bankrupt for a supersedeas shall be dismissed, on the ground of his being out of the jurisdiction of the Court, the respondent should serve the bankrupt's agent with notice of the motion, having previously obtained an order that service on the agent shall be a good service. *Ex parte Drake*, 1833. 3 Dea. & Chit. 284.

Hearing Petition.

A petition to except to a report is heard before a petition to confirm it, notwithstanding the latter petition stands first in the paper. The petition must specify the exceptions.

The master should not draw conclusions of law, but leave the legal result to the Court. *Ex parte Cox*, 1833. 3 Dea. & Chit. 11. *Ex parte Smith, Ibid.*

Where a petition is permitted to stand over, to enable the petitioner to be prepared with an affidavit of service, the respondent must have notice of the day when the petition is to be brought on. *Ex parte Mucklow*, 1833. 3 Dea. & Chit. 25.

On a petition for a re-hearing, the party who presents such petition opens the case. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 78. The former order in this case confirmed. See *ante*, p. 70.

To support an objection to the hearing of a petition on the ground of the costs not having been paid by the petitioner, as directed by a former order, there must have been a personal demand of the costs. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

Where a party petitions, *quod* creditor, an objection to the validity of his debt is not a preliminary objection, although he is bound to prove that he is legally a creditor. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

Re-hearing Petition.

When a petition for re-hearing states new facts, it should be in the nature of a supplemental petition; and the original petition should be set down for hearing at the same

time. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 71.

The time for the presenting a petition for a re-hearing in bankruptcy is not limited to six months, nor need such petition state the ground of the application. *Ex parte Greenwood*, 1833. 3 Dea. & Chit. 398; S. C. 1 Mont. & Ayr. 65.

The re-hearing of a former petition may be brought on by a petition for re-hearing it, without obtaining a previous order for the re-hearing. *Ex parte Thompson, re Ecroyd*, 1834. 3 Dea. & Chit. 612; S. C. 1 M. & A. 312—324.

Re-answering Petition.

The Court will not re-answer a petition for a more distant day, because the respondent has not been served four days before his attendance on it is required. *Ex parte Peake, re Bicknell*, 1834. 3 Dea. & Chit. 551; S. C. 1 M. & A. 309.

Service of Petition.

The petition of an equitable mortgagee must be served upon the assignees; service on the solicitor is irregular. *Ex parte Cooks*, 1833. 3 Dea. & Chit. 24.

The Court refused to make an order that service of a petition against an attorney, for an order to pay certain costs for which he had been declared liable, by leaving a copy at his chambers, should be deemed good service. *Re Sandys*, 1833. 3 Dea. & Chit. 34.

Petition not served cannot be advanced. *Ex parte Harding, re Barrett*, 1833. 1 Mont. & Ayr. 115.

It seems that a party may depose, *vivâ voce*, to having been served. *Ex parte Tull, re Davis*, 1833. 1 Mont. & Ayr. 225.

After a proof by *A.*, as the holder of a bill of exchange, *B.* pays it for the honour of the drawer, which is unknown to the assignees until after several dividends had been paid by them to *A.*'s representatives. Upon a petition by the assignees to expunge the proof and refund the dividends, Held, that the drawer of the bill, or *B.*, who paid it for his honour, ought to have been served with the petition, notwithstanding the assignees (it did not appear how) had obtained the possession of the bill.

Quære, Whether, if they had been served, a petition in bankruptcy was the proper remedy to compel the repayment of the dividends. *Ex parte Greenwood*, 1833. 3 Dea. & Chit. 398; S. C. 1 Mont. & Ayr. 65.

Where, on a petition to stay the certificate, the bankrupt's solicitor requested delay, and undertook to serve the petition on the bankrupt, the latter cannot afterwards have the petition called on out of turn to be dismissed for want of personal service, according to *Ex parte Moore*, 1 Gl. & J. 253, and *Ex parte Brenchly*, 1 Mont. & Gregg. Dig. 161.

Semble, That the rule that a bankrupt cannot waive the necessity

of personal service of a petition to stay his certificate, does not apply when a professional man is interposed. *Ex parte Hetherington, re Glossop*, 1833. 1 Mont. & Ayr. 607.

If the sole assignee be a creditor, and sign the consent to a supersedeas, he need not be served with the petition. *Ex parte Ramsey*, 1834. 1 Mont. & Ayr. 708.

Setting down.

A petition to supersede, with consent of creditors, cannot be entertained without the usual certificate of the Commissioners, nor unless it is set down on the paper for hearing. *Ex parte Croker*, 1833. 3 Dea. & Chit. 9.

A petition answered for a particular day, should be placed at the head of the paper for that day. *Ex parte Mucklow*, 1833. 3 Dea. & Chit. 25.

When a petition for re-hearing states new facts, it should be in the nature of a supplemental petition, and the original petition should be set down for hearing at the same time. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 71.

Signature of.

On a petition to supersede, by consent of creditors, the official assignee need not sign the petition. *Ex parte Parker*, 3 Dea. & Chit. 112.

A petition of assignees is informal, if signed by one only: *Scoble*, that such strictness is not now re-

quired, with respect to the attestation of a petition by a solicitor. *Ex parte White*, 1833. 3 Dea. & Chit. 366.

Petition for supersedeas, with consent of creditors, one dies insolvent after proof, and his executor does not prove the will:—Held, that his brother-in-law might sign the consent. Another creditor becomes bankrupt, and one of his assignees is abroad: Held, that the signature of the other assignee was sufficient, with an affidavit of the consent of the absent assignee. Another creditor, who had proved a debt as the continuing partner of a firm that had dissolved their partnership, died before his retiring partner. Held, that his executrix might sign the consent. *Ex parte Leader*, 1833, 3 Dea. & Ch. 468; S. C. 1 Mont. & Ayr. 204.

Striking out of Paper, and Restoring.

The respondent not appearing when a petition was called on for hearing, the petitioner took such order as he could abide by; the Court refused the application of the respondent on a subsequent day, to restore the petition to the paper, where the only cause assigned for the respondent's non-appearance was, that his agent had overlooked the entry of the petition on the former occasion. *Re Wilks*, 1833. 3 Dea. & Chit. 338.

To annul.

When the bankrupt petitions to

annul the fiat, on the ground that he has not committed an act of bankruptcy, the Court will order him to be furnished with copies of the depositions relating to the act of bankruptcy. *Ex parte Smith*, 1833. 3 Dea. & Chit. 101.

Although a fiat is concerted for the purpose of defending an action brought by a creditor against a bankrupt, for the recovery of his debt, yet, where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the Court will dismiss the petition. *Ex parte Mills, re Coleman*, 1834. 3 Dea. & Chit. 606; S. C. 1 M. & A. 310.

Where a creditor petitions to annul a fiat, after the bankrupt has obtained his certificate, there must be a distinct allegation of fraud against the bankrupt in the petition; it is not sufficient to state fraud on the affidavit. *Ex parte Wyatt*, 3 Dea. & Chit. 665; S. C. 1 Mont. & Ayr. 405.

A creditor cannot petition to supersede who has lain by twelve months after the issuing of the fiat, without assigning some good reason for the delay. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

Any party who can show that he sustains a grievance from a fiat, may petition to supersede it, notwithstanding he claims adversely to it. A trustee, therefore, under a trust deed which the fiat would over-reach, may petition for this purpose. *Ex parte*

Jones, re Lamplough, 1834. 3 Dea. & Chit. 697; S. C. 1 M. & A. 442.

To confirm Report.

A petition to except to a report, is heard before a petition to confirm it, notwithstanding the latter petition stands first in the paper. The petition must specify the exceptions. The master should not draw conclusions of law, but leave the legal result to the Court. *Ex parte Cox, Ex parte Smith*, 1833. 3 Dea. & Chit. 11.

To except to Report.

A petition to except to a report is heard before a petition to confirm it, notwithstanding the latter petition stands first in the paper. The master should not draw conclusions of law, but leave the legal result to the Court. *Ex parte Cox, Ex parte Smith*, 1833. 3 Dea. & Chit. 11.

To expunge Proof.

After a proof by *A.*, as the holder of a bill of exchange, *B.* pays it for the honour of the drawer, which is unknown to the assignees until after several dividends had been paid by them to *A.*'s representatives. Upon a petition by the assignees to expunge the proof and refund the dividends:—Held, that the drawer of the bill, or *B.*, who paid it for his honour, ought to have been served with the petition, notwithstanding the assignees (it did not appear how) had obtained the possession of the bill. *Quere*, Whether, if they had

been served, a petition in bankruptcy was the proper remedy to compel the re-payment of the dividends. *Ex parte Greenwood*, 1833. 3 Dea. & Chit. 398 ; S. C. 1 Mont. & Ayr. 65.

A., *B.*, *C.* and *D.* contract a debt with *W.*, for goods supplied to them on their joint account. *A.*, *B.*, and *C.* become bankrupt, and *W.* proves the amount of his debt under their commission, stating in his deposition, that *A.*, *B.*, and *C.* only, (without noticing *D.*) were jointly indebted to him, but he afterwards sues, and recovers the amount of his debt against *D.*, the solvent partner:—Held, that in consequence of the informality of the proof, *W.* must pay the costs of the application of the assignee to expunge it. *Ex parte Adams, re Thackeray*, 1834. 3 Dea. & Chit. 623.

For leave to Surrender.

Petitioning to enlarge the time to surrender, is a slight act of acquiescence ; but lying in prison, under a commitment by Commissioners, is a strong act of acquiescence. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 298.

To Prove.

A petition to stay the certificate and to prove was presented : Held, 1st. It need not state that the petitioner is a creditor.—(*Sed quære.*)—2nd. It need not state when the debt was rejected.—3rd. It need not state what debt was rejected. *Ex parte Robinson, re Case*, 1834. 1 Mont. & Ayr. 705.

To stay Certificate.

A petition to stay the certificate, charging that the bankrupt admitted that he had lost 25*l.* in one sitting, is demurrable ; it ought positively to allege the fact, and that the money was lost in one day. *Ex parte Crouch*, 1833. 3 Dea. & Ch. 17.

A petition to stay the certificate and to prove was presented :—Held, 1. It need not state that the petitioner is a creditor—(*sed quære.*)—2. It need not state when the debt was rejected.—3. It need not state what debt was rejected. *Ex parte Robinson, re Case*, 1834. 1 Mont. & Ayr. 705.

Where, on a petition to stay the certificate, the bankrupt's solicitor requested delay, and undertook to serve the petition on the bankrupt, the latter cannot afterwards have the petition called on out of turn, to be dismissed for want of personal service, according to *Ex parte Moore*, 1 Gl. & J. 253 ; *Ex parte Brenchly*, 1 Mont. & Glegg. Dig. 161 ; and *Ex parte Hetherington, re Glossop*, 1833. 1 Mont. & Ayr. 607.

Semble, that the rule that a bankrupt cannot waive the necessity of personal service of a petition to stay his certificate, does not apply when a professional man is interposed. *Ibid.*

To Supersede.

A petition to supersede with consent of creditors cannot be entertained without the usual certificate of the Commissioner, nor unless it is

set down in the paper for hearing. *Ex parte Croker*, 1833. 3 Deac. & Chit. 9.

On a petition by creditors to supersede, on the ground of fraudulent collusion between the petitioning creditor and the bankrupt, the bankrupt's affidavit detailing the particulars of the fraud is admissible in evidence. *Ex parte Arnsby*, 1833. 3 Dea. & Chit. 10.

On a petition to supersede, by consent of creditors, the official assignee need not sign the petition. *Ex parte Parker*, 1833. 3 Dea. & Chit. 112.

A petition to supersede a joint commission, on consent of creditors, cannot be entertained as to any one of the bankrupts who has not surrendered. *Ex parte Knowlson*, 1833. 3 Dea. & Chit. 191.

On a petition for a supersedeas with consent of creditors, where one of the creditors had died intestate:—Held, that the bankrupt should either have taken out a limited administration for the purpose of assenting to the supersedeas, or (which would have been the better plan) apply to the Court to expunge the proof. *Ex parte Hall*, 1833. 3 Dea. & Chit. 449; S. C. 1 M. & A. 54.

Petition for supersedeas, with consent of creditors, one dies insolvent after proof, and his executor does not prove the will:—Held, that the brother-in-law might sign the consent. Another creditor becomes bankrupt, and one of his assignees is

abroad:—Held, that the signature of the other assignee was sufficient, with an affidavit of the consent of the absent assignee. Another creditor who had proved a debt as the continuing partner of a firm that had dissolved their partnership, died before his retiring partner:—Held, that his executor might sign the consent. *Ex parte Leader*, 1833. 3 Dea. & Chit. 468; S. C. 1 Mont. & Ayr. 204.

Where a bankrupt, after commencing two actions against the petitioning creditor and the messenger, presents a petition to supersede, the Court will require him to discontinue the actions before it proceeds to hear the petition. But see next case. *Ex parte Pownal*, 1834. 3 Dea. & Chit. 723. S. C. 1 M. & A. 116, 314.

Where a bankrupt petitions to annul the fiat, on the ground of there being no petitioning creditor's debt nor any act of bankruptcy, the Court cannot compel him to undertake not to bring an action. But see the preceding case. *Ex parte Daly*, 1834. 3 Dea. & Chit. 723; S. C. 1 Mont. & Ayr. 343.

The Court would not restrain an action in which the bankrupt intended fairly to try the validity of the commission. If bankrupt petition to supersede, having actions pending, he must elect. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 299.

On a *viva voce* examination on a

petition to supersede, a creditor is not a competent witness. *Ex parte Lavender*, 1834. 1 Mont. & Ayr. 702.

PETITIONING CREDITOR.

A new fiat issued on the application of the petitioning creditor, to give effect to a more recent act of bankruptcy, the time for opening the first fiat not having expired. *Re Crawley*, 1833. 3 Dea. & Chit. 251.

A petitioning creditor having become bankrupt, before the fourteen days for opening the fiat had elapsed, it was ordered that another creditor might take new docket papers into the office, and if the first fiat was not prosecuted, that he might then issue a fresh fiat. *Ex parte Smith*, 1833. 3 Dea. & Chit. 309; S. C. 1 Mont. & Ayr. 78.

The petitioning creditor, after issuing a fiat, found he could not support it on account of his inability to prove the trading. The Court refused to permit another petitioning creditor to issue a second fiat before the time of proceeding in the first was expired. *Ex parte Howes, re Darkly*, 1833. 3 Dea. & Chit. 493.

Although the petitioning creditor goes abroad after issuing a fiat, the Court will not permit another creditor to issue a second fiat until the time for proceeding in the first has expired. *Ex parte Medley, re Hailey*, 1833. 3 Dea. & Chit. 502; S. C. 1 Mont. & Ayr. 79.

Attendance of a petitioning cre-

ditor dispensed with, under the circumstances, at the opening of the fiat. *Re Polton*, 1834. 3 Dea. & Chit. 688.

In replevin the defendant avowed for rent in arrear from one *J. M.*, and also claimed the goods as being the property of himself and another, as assignees of *J. M.*, against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record, the Court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Semble*, that pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant, founded on his demand for rent. *Emery v. Mucklow*, 1834. 4 Moore & Sco. 263; S. C. 10 Bing. 401.

PETITIONING CREDITOR'S DEBT.

The bankrupt, who was in partnership with *W. P.*, borrowed various sums of him by way of personal loan, and upon the dissolution of partnership, purchased the stock in trade for a stipulated sum. *W. P.* made out an account, entitled "*Mr. H. P.*" (the bankrupt) "in account with *H.* and *W. P.*":—Held, that *W. P.* had a good petitioning creditor's debt, notwithstanding this mode of entitling

the account. *Ex parte Richardson*, 1833. 3 Dea. & Chit. 244.

A. lends *B.* money to enable him to commence a trade, at five per cent. interest. After the loan, *B.* agrees to pay to *A.* one-eighth of the annual profits, by monthly payments, which offer *A.* accepts; and *B.* accordingly makes several monthly payments, for which *A.* gives *B.* receipts on account:—Held, that the balance of the principal and interest due from *B.* to *A.* was a good petitioning creditor's debt, not arising out of a partnership, nor affected by usury. *Ex parte Briggs*, 1833. 3 Dea. & Chit. 367; *S. C.* 1 Mont. & Ayr. 46.

A tender made to the petitioning creditor of the payment of his debt, after a docket had been already struck against the bankrupt, although before the fiat was actually issued, is not sufficient to defeat the fiat. *Ex parte Jones, re Lamplough*, 1834. 3 Dea. & Chit. 697; *S. C.* 1 Mont. & Ayr. 442.

Plaintiff being liable to defendant for the costs of a nonsuit, issued a fiat of bankruptcy against the defendant. The Court refused to stay defendant's proceedings in the action. *Eicke v. Nokes*, 1834. 1 Bing. New Cases, 69.

PLEA OF BANKRUPTCY.

Where an administrator, being under terms to plead issuably, pleads inconsistent pleas, *e. g.* plene administravit and his bankruptcy, the plaintiff may sign judgment as for want of

a plea. *Serle v. Bradshawe*, 1833. 4 Tyrw. 69.

PLEDGE.

H., a money broker, was in the habit of depositing bills of exchange with *B.* and Co. as a security for advances, but he did not indorse the bills, nor were they negotiated by *B.* and Co., or ever presented for payment. Amongst the bills so deposited was one for 1000*l.* accepted by *C.*, who became bankrupt on the 5th March 1824, which was some time after the bill fell due. *H.* also became bankrupt on the 12th December 1825, when *B.* and Co. proved the amount of the balance he owed them, excepting this bill as a security; but made no attempt to prove the bill under *C.*'s commission until January 1826, when the Commissioners rejected the proof:—Held, that the delivery of the bill by *H.* to *B.* and Co. must be taken to have been by way of pledge, to secure the amount of the advances then due from *H.* to *B.* and Co., and not with an intention to transfer the property in it; and that the amount of those advances having been since paid, *B.* and Co. could not, under these circumstances, prove the bill under *C.*'s commission. *Ex parte Britten*, 1833. 3 Dea. & Chit. 35.

POSSESSION.

See also REPUTED OWNERSHIP.

In 1818, *A.* conveys Blackacre to *B.*; *B.* becomes bankrupt, and his

assignees convey, in 1833, to C. In 1834 A. conveys Blackacre to D. It is competent to D., in an ejectment brought against him by C., to show that in 1818 A. had no legal estate in Blackacre. Whether a conveyance by assignees of a bankrupt, where neither bankrupt nor assignees have been in possession within a year, amounts to embracery, *quære?* *Doe v. Powell*, 1834. 3 Nev. & Man. 616.

POWER,

Destruction of.

R. M. made a settlement of real estate to the use of himself for life, with a power to appoint to any one or more of his sons, in fee or otherwise, and, in default of appointment, to his first and other sons in tail, with remainder to himself in fee. He became bankrupt, and subsequently to his bankruptcy appointed to his eldest son in fee:—Held, that the appointment could not enure as an appointment to a base fee, determinable on the extinction of the prior estates tail, because such a limitation would have been bad in the settlement creating the power.

Quære. Whether the power was destroyed by the bankruptcy; the Court considering that the invalidity of the appointment rendered it unnecessary to determine that point. *Badham v. Mee*, 1832. 1 Mylne & Keen, 32.

POWER OF ATTORNEY.

Where a creditor gave a power of attorney in general terms, but without any express power to consent to a supersedeas, and the signature of the creditor himself to such consent was easily attainable:—Held, that his own signature ought to be procured. *Re Sampson*, 1833. 3 Dea. & Chit. 198.

POWER OF SALE.

Before a mortgagee with a power of sale can apply for leave to bid, he must waive his power of sale, and come before the Court in the simple character of a mortgagee. *Ex parte Davis, re Hagley*, 1833. 3 Dea. & Chit. 504; S.C. 1 M. & A. 89.

PRACTICE IN COURT.

See also PETITION.

A petition to confirm a report, stood in the paper before a petition excepting to it; the counsel for the first petition has a right to begin by stating the facts of his petition before the counsel for the second petition proceeds to state and argue the exceptions. *Ex parte Morley, re Leigh*, 1833. 3 Dea. & Chit. 509.

When a petition stands over to have a *viva voce* examination, that side begins with whom the affirmative lies. *Ex parte Daly*, 1834. 1 M. & A. 384.

PRE-AUDIENCE.

A petition to confirm a report stood in the paper before a petition excepting to it, the counsel for the first petition has a right to begin by stating the facts of his petition, before the counsel for the second petition proceeds to state and argue the exceptions. *Ex parte Morley, re Leigh*, 1833. 3 Dea. & Chit. 509.

When a petition stands over to have a *vidé voce* examination, that side begins with whom the affirmative lies. *Ex parte Daly*, 1834. 1 M. & A. 384.

PRELIMINARY OBJECTIONS.

Where a party petitions *quâd* creditor, an objection to the validity of his debt is not a preliminary objection, although he is bound to prove that he is legally a creditor. *Ex parte Wyatt*, 1834. 3 Dea. & Chit. 665; S. C. 1 M. & A. 405.

PRINCIPAL AND AGENT.

A London banker having a branch bank at Edinburgh, stops payment on the 2d of January, and writes to his agent at Edinburgh, apprising him of the fact, and directing the business of the branch bank to be discontinued. On the 4th January, before this notice reaches the agent, the petitioner pays into the Edinburgh bank 305*l.* 15*s.* in notes and cash, to be remitted to the house in London; but after the news reaches Edinburgh, and whilst the notes were still in the agent's possession, gives him notice not to part

with them, and they remained in his hands on the 26th January, when a fiat issued against the banker in London. The agent at Edinburgh having a lien on the funds in his hands, the assignees permitted him to retain the 305*l.* 15*s.* in part satisfaction of his lien:—Held, that the assignees were bound to refund this sum to the petitioners. *Ex parte Cunningham*, 1833. 3 Dea. & Ch. 58.

The same order made as in *Ex parte Cunningham*, *suprà*, p. 58, although the notes delivered to the banker's agent were not identified. *Ex parte Solomons*, 1833. 3 Dea. & Ch. 77.

The same order was also made in this case. The notes in this case were paid in by the customer on the 3d January to a sub-agent of the banker at Glasgow, who remitted them on the 4th to the managing agent at Edinburgh. *Ex parte Wylie*, 1833. 3 Dea. & Chit. 82.

The order made in *Ex parte Cunningham*, p. 58, confirmed on appeal to the Lord Chancellor. *Ex parte Belcher*, 1833. 3 Dea. & Ch. 87.

Where an affidavit is reported to be scandalous, the agent in London who files the affidavit is responsible for the costs, as between attorney and client, notwithstanding the country attorney may have drawn the affidavit himself. *Ex parte Wake*, 1833. 3 Dea. & Chit. 246.

Before a motion is made, that the petition of the bankrupt for a su-

perseus shall be dismissed, on the ground of his being out of the jurisdiction of the Court, the respondent should serve the bankrupt's agent with notice of the motion, having previously obtained an order that service on the agent shall be good service. *Ex parte Drake*, 1833. 3 Dea. & Chit. 284.

A., in France, employs *B.* in England to sell wines by commission, as well as to purchase other wines on *A.*'s account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold in *B.*'s name, part of the wines consigned by *A.* were in the dock warehouses, standing in *B.*'s name, and part formed the indiscriminate stock of *B.*'s cellar. *A.* closes the connection with *B.* and requires him to deliver up all the wines, but *B.* neglects to comply with the requisition, and shortly afterwards becomes bankrupt:—Held, that no order could be made for the payment to *A.* of any monies, the produce of the wines, if mixed with the other monies of *B.* at the time of his bankruptcy. *Ex parte Moldaut*, 1833. 3 D. & C. 351.

A., in France, employs *B.*, in England, to sell wines on commission, as well as to purchase other wines on *A.*'s account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold by *B.* in his own name, part of the wines con-

signed by *A.* were in the dock warehouses, standing in *B.*'s name, and part formed one indiscriminate stock in *B.*'s cellar. *A.* closes the connection with *B.*, and requires him to deliver up all the wines, but *B.* neglects to comply with this requisition, and shortly afterwards becomes bankrupt:—Held, that *A.* might sue the purchaser of the wines in the name of *B.* or his assignees. *Ex parte Moldaut*, 1833. 3 Dea. & Ch. 351.

A bankrupt made a purchase by two agreements, one before, and one after the act of bankruptcy, and after the act of bankruptcy, received part of the timber without paying for it, but was not entitled to receive the remainder without giving security for the whole. After the act of bankruptcy the defendant became security, and purchased from the bankrupt the benefit of the contract, which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant, that he, the bankrupt, would pay the money due to the vendor for the timber purchased by the first agreement, and in part received, and should be entitled to retain the timber so purchased. The bankrupt then delivered money and bills to the defendant, to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them, and afterwards paid the

amount of the cash and of the bills to the vendor, by a single draft on those bankers. After this the commission issued:—Held, that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for the defendant was the mere agent of the vendor, and neither the cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a *bona fide* one, protected by 6 Geo. 4. c. 16. s. 82. *Shaw v. Batley*, 1833. 4 Barn. & Adol. 801; S.C. 1 Nev. & Man. 751.

PRINCIPAL AND SURETY.

H. S., who employs *E. and Co.* as his brokers, and *L. and Co.* as his general agents, gives *E. and Co.* the following undertaking:—In consideration of your allowing *L. and Co.* to draw upon you to the extent of 12,000*l.*, and your accepting three drafts accordingly, I hereby guarantee to you that amount, it being distinctly understood that payment of these drafts is to be provided either by myself or *L. and Co.* in direct discountable bills. *E. and Co.* accordingly accept and pay these drafts, in consideration of which they receive from *H. S.* and *L. and Co.* various substituted bills. *H. S.* and *L. and Co.* respectively become bankrupts, when the substituted bills are still running, and which are not paid when they fall due:—Held, that *L. and Co.* were entitled to prove

under the commission against *H. S.* the balance that was due to them in respect of their advances on the faith of this undertaking, which was not so much a guarantee as an original undertaking of *H. S.* as a principal. And *semble*, it would have been proveable, even though the instrument might be considered as a guarantee. *Ex parte Simpson, re Sudell*, 1834. 3 Dea. & Chit. 792; S. C. 1 M. & A. 541.

PRIORITY OF DEBTS.

A judgment on a warrant of attorney is not within the protection of 1 Will. 4. c. 7. s. 7., and therefore is within the 108th section of 6 Geo. 4. c. 16. In assumpsit for money had and received against the sheriff to recover the proceeds of a sale under a *fi. fa.* issued upon a judgment not protected by 1 Will. 4. c. 7. s. 7., the plaintiff was held liable, where notice of an act of bankruptcy was committed before the sale, and of a docket struck thereon, was given to him when the sale was nearly completed, after which he received the proceeds, and handed them over to the execution creditor. *Crossfield v. Stanley*, 1832. 1 Nev. & Man. 668; S.C. 4 Barn. & Adol. 87.

PRISONER, REMANDING.

A prisoner regularly committed by a Commissioner to the messenger, and subsequently irregularly committed by the Subdivision Court, is not, on a discharge under habeas

corpus, remanded to the custody of the messenger. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 214.

PRIVATE ARRANGEMENTS.

The Court will not interfere, on the application of the assignees, to sanction an arrangement made by them for the satisfaction of a claim of the bankrupt's wife; the assignees must use their own discretion. *Ex parte James*, 1833. 3 Dea. & Chit. 290.

Nor will the Court sanction a compromise, though reported beneficial by the Master. *Ex parte Williams, re Weinholt*, 1834. 1 Mont. & Ayr. 689.

PRIVILEGE FROM ARREST.

A bankrupt is protected from arrest, on an attachment for contempt for non-payment of money, on his return home from passing his last examination. *Ex parte Jeyes*, 1834. 3 Dea. & Chit. 764.

PROCEEDINGS.

The solicitor is bound to deliver up the proceedings to a fresh solicitor appointed by the surviving assignee, without waiting until a fresh assignee is chosen in the room of the one who is dead. *Ex parte Ackroyd*, 1833. 3 Dea. & Chit. 21.

The Court will not order the Registrar to attend with the proceedings at the trial of an action on behalf of a party who is a stranger to

the commission. *Ex parte Munk*, 1833. 3 Dea. & Chit. 233.

Under the 6 Geo. 4. c. 16. s. 96. the Court have a general power, upon petition, to direct the proceedings to be entered of record. *Ex parte Thomas*, 1833. 3 Dea. & Chit. 292.

An application by the bankrupt to stay the advertisement in the Gazette, on his own affidavit, merely denying the existence of the petitioning creditor's debt, or the committal of any act of bankruptcy, without any allegation of his solvency, will not be entertained, unless the proceedings are produced for the inspection of the Court. *Ex parte Pownall*, 1834. 3 Dea. & Ch. 723; S. C. 1 M. & A. 314.

Solicitor allowed to take affidavits off the file to attend action therewith, undertaking to return them in the same state. *Ex parte Whaley*, 1834. 1 Mont. & Ayr. 634.

P R O O F.

Generally.

H., a money broker, was in the habit of depositing bills of exchange with *B.* and *C.* as a security for advances, but he did not indorse the bills, nor were they negotiated by *B.* and *C.*, or ever presented for payment. Amongst the bills so deposited was one for 1000*l.*, accepted by *C.*, who became bankrupt on the 5th March 1824, which was some time after the bill fell due. *H.* also became bankrupt on the 12th December 1825, when *B.* and *Co.*

proved the amount of balance he owed them, excepting this bill as a security, but made no attempt to prove the bill under C.'s commission, until January 1826, when the Commissioners rejected the proof:—Held, that the delivery of the bill by H. to B. and Co. must be taken to have been by way of pledge, to secure the amount of the advances then due from H. to B. and Co. and not with an intention to transfer the property in it, and that the amount of the advances having been since paid, B. and Co. could not, under these circumstances, prove the bill under C.'s commission. *Ex parte Britten*, 1833. 3 Dea. & Chit. 85.

A party is not estopped from amending his deposition of proof, by making a second deposition contradictory to the first; the only question is, which is the most worthy of credit. *Ibid.*

Assignees are not removable merely because Commissioners improperly reject the proofs of creditors who would have been entitled to vote in the choice of assignees, if they had been permitted to prove their debts; unless, indeed, their proofs are fraudulently procured to be rejected. *Ex parte Milner*, 1833. 3 Dea. & Chit. 235.

When the omission to prove a debt proceeds from a creditor's own laches, the Court will not order a dividend to be stayed until his petition to prove can be heard. *Ex parte Brees*, 1833. 3 Dea. & Chit. 233.

One of two partners accept bills for a previous partnership liability, after his co-partner has committed an act of bankruptcy:—Held, that these bills were, in the hands of a *bond fide* holder, provable against the joint estate under a subsequent commission issued against both parties. *Ex parte Robinson*, 1833. 3 Dea. & Chit. 376; S. C. 1 Mont. & Ayr. 18.

On a petition for leave to prove and stay the bankrupt's certificate, the Court will, where the circumstances are suspicious, direct a meeting to enable the creditors to prove, and order the Commissioners to review the certificate. *Ex parte Bray, re Bridgwood*, 1833. 3 Dea. & Chit. 495.

The bankrupt, who was an actuary of a savings' bank, had embezzled various sums of money to a large amount, and made false entries and alterations in the cash book to conceal the deficiency in his accounts; but what were the precise sums embezzled, or on what day they were taken, the trustees of the bank were unable to point out. The Commissioners refused to allow the trustees to prove against the bankrupt's estate until they prosecuted the bankrupt for embezzlement; upon which they preferred five several indictments against him, but failed in convicting him, through their inability to prove an embezzlement of any specific sum, according to the requisites of the statute. Upon a second application

to the trustees to prove, the Commissioners refused to admit their proofs for any sums which were not included in the indictment:—Held, that the trustees having *bond fide* prosecuted the indictments against the bankrupt, and used their best endeavours to convict him of the felony, were entitled to prove for the whole amount of the sum which the bankrupt had embezzled. *Ex parte Jones*, 1833. 3 Dea. & Chit. 525.

F., a partner in a banking house, transferred bank stock belonging to a customer by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by *F.*, who was subsequently executed for other forgeries. The other partners were ignorant of the transaction, but with common diligence could have known it:—Held, the customer could maintain an action against the partners for money had and received. *Keating v. Marsh*, 1834. 1 Mont. & Ayr. 582. Affirmed, *id.* 592.

F., a partner in a banking-house, transferred bank stock belonging to a customer by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by *F.*, who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but with common diligence could have known of it. *Quære*. Whether the customer can prove for the value of

the stock under the commission? An action ordered to try whether the partners were indebted to the customer. *Ex parte Bolland, re Marsh*, 1834. 1 Mont. & Ayr. 570.

H. S., who employed *E. & Co.* as his brokers, and *L. & Co.* as his general agents, gives *E. & Co.* the following undertaking:—"In consideration of your allowing *L. & Co.* to draw upon you to the amount of 12,000*l.*, and your accepting three drafts accordingly, I hereby guarantee to you that amount, it being distinctly understood that payment of these drafts is to be provided either by myself or *L. & Co.*, in direct discountable bills." *E. & Co.* accordingly accept and pay these drafts, in consideration of which they receive from *H. S.* and *L. & Co.* various substituted bills. *H. S.* and *L. & Co.* respectively become bankrupts when the substituted bills are still running, and which are not paid when they fall due:—Held, that *L. & Co.* were entitled to prove under the commission against *H. S.* the balance then due to them in respect of their advances on the faith of this undertaking, which was not so much a guarantee as an original undertaking of *H. S.* as a principal. And *semble*, it would have been provable even though the instrument was considered as a guarantee. *Ex parte Simpson, re Sudell*, 1834. 3 Dea. & Chit. 792; *S. C.* 1 M. & A. 541.

A claim on proof cannot be resisted, because the creditor has pro-

perty belonging to the estate in his possession ; that is only a ground to restrain payment of the dividends. *Ex parte Dobson, re Thompson*, 1834. 1 Mont. & Ayr. 666.

Proof by joint estate for fraudulent abstraction, when admissible. *Ex parte Turner, re Mackenzie*, 1833. 1 Mont. & Ayr. 54. Affirmed, *id.* 357.

A petition to stay the certificate and to prove was presented :—Held, 1st. It need not state that the petitioner is a creditor ; (*sed quære.*) 2dly. It need not state when the debt was rejected. 3dly. It need not state what debt was rejected. *Ex parte Robinson, re Case*, 1834. 1 M. & A. 705.

Of Contingent Debts.

A bankrupt had on his marriage entered into a bond to trustees to pay them 1200*l.*, upon trust for himself for life, if he should not become a bankrupt, with remainder to his intended wife for life, with the usual limitations to children ; and on the faith of the bond he was permitted to apply to his own use his wife's marriage portion, amounting to 150*l.* : —Held, that the trustees were entitled to prove for the 1200*l.* The dividends to be invested in stock, the dividend of which was to be subject to the payment of interest to the wife on the 150*l.*, and the remainder to the bankrupt's creditors for his life, and after his death, upon the

trusts of the bond. *Ex parte Skute*, 1833. 3 Dea. & Chit. 1.

Where the bankrupt had entered into a joint bond with a co-obligor to indemnify the sheriff against any loss he may sustain from relinquishing the possession of goods seized under an execution, and no loss was actually sustained by the sheriff until after the issuing of the fiat :—Held, that the sheriff could prove no debt by virtue of the bond. *Ex parte Marshall*, 1834. 3 Dea. & Chit. 120 ; S. C. 1 Mont. & Ayr. 145.

By the terms of the bankrupt's marriage settlement the wife's property was settled upon her, in case of the bankrupt's death, or the parties being divorced, but the bankrupt was entitled to the interest for his life, and in case he survived his wife, he was to have a certain share of this property :—Held, that the wife might, in the name of her trustee, make such proof as the Commissioners might think she was entitled to. *Ex parte Saunders*, 1834. 3 Dea. & Chit. 568.

The bankrupt having received 550*l.* with his wife on his marriage, gave a bond to trustees conditioned for the payment of 1100*l.* "on receiving notice from the trustees :"—Held, that although no notice was given to the bankrupt before his bankruptcy, this was nevertheless a contingent debt proveable within the provisions of the 56th section of 6 Geo. 4. c. 16. *Ex parte Hooper, re West*, 1834. 3 Dea. & Chit. 655.

R. C. borrowed a sum of money, and gave the lenders a bond, by which he and four others bound themselves jointly and severally in a penalty for the regular payment of interest, and for the discharge of the principal and all interest which might be due at the end of five years, or, if sooner called upon, then at twenty-one days after demand. One of the co-obligors of *R. C.* became bankrupt, and obtained his certificate. At the time of the bankruptcy a forfeiture had accrued by nonpayment of interest, but it was not insisted upon, and the interest was subsequently paid up. After the certificate, *R. C.* was called upon for the principal, but did not pay, and payment was enforced from the four co-obligors, who had continued solvent. In an action by one of them against the party who had been bankrupt, for contribution,—Held, that they could not have proved under the commission by sect. 52 of the Bankrupt Act, and therefore that the certificate was no answer to the action. *Clements v. Langley*, 1833. 5 Barn. & Adol. 372.

By Agent.

A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign government. The bills were not paid; process of insolvency issued against the foreign firm, and a commission against the English partner:—Held, the agent

may prove under the commission, but will be restrained from receiving dividends unless he elect not to prove under the insolvency abroad. *Ex parte Mattos, re Vanzeller*, 1834. 1 Mont. & Ayr. 345. Affirming *Ex parte Cotesworth*, 1 Dea. & Chit. 281; S. C. Mont. & B. 92.

Under a fiat against a banker, one person allowed to prove on behalf of a large number of holders of *l.* notes, not interfering as to the assignee or the certificate. *Ex parte Gordon, re Maberly*, 1834. 1 M. & A. 282.

By Partner.

B. is a partner with *A.* as nail manufacturers, and with *C.* as grocers. The firm of *B.* and *C.* advance monies to the firm of *A.* and *B.*:—Held, that if *B.* and *C.* were not liable for the debts of *A.* and *B.*, *B.* and *C.* could prove under a fiat issued against *A.* and *B.* *Ex parte Thompson, re Ecroyd*, 1834. 3 Dea. & Chit. 612; S. C. 1 M. & A. 312, 324.

Amount of.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency, although occasioned by the payment of the rent. *Ex parte Cocks*, 1833. 3 Dea. & Chit. 8.

The bankrupt, who was a tavern keeper, had bought of the petitioners large quantities of wines, lying in the docks, which were sold

to him by sample for stipulated prices and at long credit, and for which the petitioners delivered to him the usual transfer warrants. The assignees sold the wines by auction, at a considerable loss. In consequence of which, the Commissioner made a reduction in the petitioner's proof, on the ground that the prices charged for the wines were too high. Held, that he was not justified in making such reduction. The costs of the petitioner, under these circumstances, were ordered to be paid out of the estate. *Ex parte Reay*, 1833. 3 Dea. & Chit. 175.

F. and *Co.* sold cochineal to *John W.*, for which a small part of the price was paid in cash, and the remainder by two bills at four months, but the cochineal was to remain in the hands of *F.* and *Co.* as a security for the payment of the bills. The bills not being paid when due, *John W.* sent *F.* and *Co.* two other bills drawn by himself on *Joshua W.* for which no consideration was given to *Joshua W.*, the acceptor. Before these bills fell due both *John W.* and *Joshua W.* became bankrupts, and the price of cochineal had fallen so much in the market, that *F.* and *Co.* afterwards sold it for not a third of the price at which *John W.* had bought it, and they then proved for the deficiency under *John W.*'s commission:—Held, that they had also a right to prove the amount of the two bills under *Joshua W.*'s commission,

without deducting the proceeds arising from the sale of the cochineal. *Ex parte Bonham*, 1833. 3 Dea. & Chit. 285.

An insolvent compounds with her creditors for 13s. 6d. in the pound, but promises to pay one of her creditors the whole of his debt, in order to induce him to sign the composition deed. After paying him in full she contracts a fresh debt with him, and then becomes bankrupt:—Held, that the payments made to the creditors, above the composition of 13s. 6d. in the pound, were fraudulent and void, and that the creditor could not prove for the amount without first deducting the payments. *Ex parte Minton, re Green*, 1834. 3 Dea. & Chit. 688; S. C. 1 M. & A. 440.

Double.

A. and *B.* exchange their acceptances of various bills drawn upon them respectively by *C.*, and all three become bankrupt before any of the bills fall due; the acceptances of *A.* are negotiated by the drawer *C.*, and are proved by the holders under each commission, who receive dividends on their respective proofs:—Held, that *A.*'s assignees might prove the amount of *B.*'s acceptances under *B.*'s commission, subject to a retention of the dividends until it was ascertained what each estate would pay on the whole of their liabilities. *Ex parte Solarte*,

1833. 3 Dea. & Chit. 419; S.C. 1 Mont. & Ayr. 270.

Effect of.

Although a fiat is concerted for the purpose of defeating an action brought by a creditor against the bankrupt for the recovery of his debt, yet, where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the Court will dismiss the petition. *Ex parte Mills, re Colman*, 1834. 3 Dea. & Chit. 606; S.C. 1 M. & A. 310.

Expunging.

After a proof by *A.*, as the holder of a bill of exchange, *B.* pays it for the honour of the drawer, which was unknown to the assignees until after several dividends had been paid by them to *A.*'s representatives. Upon a petition by the assignees to expunge the proof and refund the dividends: Held, that the drawer of the bill, or *B.* who paid it for his honour, ought to have been served with the petition, notwithstanding the assignees (it did not appear how) had obtained possession of the bill.

Quære. Whether, if they had been served, a petition in bankruptcy was the proper remedy to compel the repayment of the dividend? *Ex parte Greenwood*, 1833. 3 Dea. & Chit. 398; S.C. 1 Mont. & Ayr. 65.

The Court can reverse the decision of a Subdivision Court on a matter of fact as to expunging a

proof, that not being within 1 & 2 Will. 4. c. 56. s. 30. *Ex parte Baldwin, re Smith*, 1834. 1 Mont. & Ayr. 615.

On an unsuccessful application to the Commissioner to expunge a debt under section 60 of 6 G. 4. c. 16. the applicant may be ordered to pay the Commissioners' and solicitor's fees, and the sums paid for the use of the room, &c. *Ex parte Kirkaldy, re Holt*, 1834. 1 Mont. & Ayr. 642.

PROTECTED PAYMENTS.

A bankrupt made a purchase of timber by two agreements, one before and one after the act of bankruptcy, and after the act of bankruptcy received part of the timber without paying for it, but was not entitled to receive the remainder without giving security for the whole. After the act of bankruptcy, the defendant became security, and purchased from the bankrupt the benefit of the contract, which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant, that he the bankrupt would pay the money due to the vendor for the timber purchased by the first agreement, and in part received, and should be entitled to retain the timber so purchased. The bankrupt then delivered money and bills to the defendant to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them; and after-

wards paid the amount of the cash and of the bills to the vendor, by a single draft on those bankers. After this the commission issued:—Held, that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for the defendant was the mere agent of the vendor, and neither cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a *bona fide* one, protected by 6 Geo. 4. c. 16. s. 82. *Shaw v. Batley*, 1833. 4 Barn. & Adol. 801; S. C. 1 Nev. & Man. 751.

R., having committed a secret act of bankruptcy, assigned chattels to the defendant as a security for money lent him by the defendant, in trust to permit R. to use them till March 1833, and then to sell them in discharge of the debt, if unpaid. In October 1832, within two months of this assignment, a commission of bankrupt was issued against R.:—Held, that the assignment was not protected by 6 Geo. 4. c. 16. s. 82. *Cannan v. Denew*, 1833. 10 Bing. 292; S. C. 3 Moo. & Sc. 761.

Judgment on a warrant of attorney is not within the protection of 1 Will. 4. c. 7. s. 7., and therefore is within the 108th section of 6 Geo. 4. c. 16. In assumpsit for money had and received against the sheriff, to recover the proceeds of a sale under a *fi. fa.* issued upon a judgment not protected by 1 Will. 4. c. 7. s. 7., the plaintiff was held liable, where notice

of an act of bankruptcy committed before the sale, and of a docket struck thereon, was given to him when the sale was nearly completed, after which he received the proceeds, and handed them over to the execution creditor. *Crossfield v. Stanley*, 1832. 1 Nev. & Man. 668; S. C. 4 Barn. & Ad. 87.

PURCHASER.

See also CONTRACT—VENDOR AND PURCHASER.

A stranger to the commission obtained an assignment of the creditors' proofs, and therewith bought part of the bankrupt's effects from the assignees. Held, the Court had no jurisdiction to set aside the purchase. [*Cross*, J. dissent.] *Ex parte Holder*, 1834. 1 Mont. & Ayr. 518.

REAL ESTATE.

By the laws of Antigua, slaves were declared to be inheritance, and affixed to the freehold, and by 59 Geo. 3. c. 120. s. 9. no deed or instrument conveying any interest in slaves was valid, unless the registered names and descriptions of the slaves were set forth in the instrument, or in some schedule thereof. The bankrupt deposited with B. and Co., as security for a loan of money, a deed of conveyance to the bankrupts of a plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves,

but they were wholly omitted in the memorandum of the deposit :—Held, 1st, that this was nevertheless a good equitable mortgage of the slaves mentioned in the deed. 2nd, That the slaves being real property in the island of Antigua, could not be considered as within the order and disposition of the bankrupts at the time of their bankruptcy. *Ex parte Rucker*, 1834. 3 Dea. & Chit. 704 ; S. C. 1 Mont. & Ayr. 481.

RECORD.

Entry of Proceedings, as of.

Under the 6 Geo. 4. c. 16. s. 96. the Court have a general power, upon petition, to direct the proceedings to be entered of record. *Ex parte Thomas*, 1833. 3 Dea. & Chit. 292.

REFERENCE TO COMMISSIONER.

Where a creditor has a clear legal right of set-off in an action brought against him by the assignees, the Court will order the action to be stayed, and refer it to the Commissioners to take the account and state the balance. *Ex parte Glegg, re Douglas*, 1833. 3 Dea. & Ch. 505 ; S. C. 1 M. & A. 91.

REFUNDING.

An insolvent compounds with her creditors for 13s. 6d. in the pound, but promises to pay one of her creditors the whole of his debt, in order to induce him to sign the composition deed. After paying him in full, she contracts a fresh debt

with him and then becomes bankrupt :—Held, that the payments made to the creditor, above the composition of 13s. 6d. in the pound, were fraudulent and void, and that the creditor could not prove for the amount of his fresh debt contracted with the bankrupt, without first deducting the payments. *Ex parte Minton, re Green*, 1834. 3 Dea. & Chit. 688 ; S. C. 1 M. & A. 440.

REGISTRAR.

A petition to except to a report is heard before a petition to confirm it, notwithstanding the latter petition stands first in the paper. The petition must specify the exceptions. The master should not draw conclusions of law, but leave the legal result to the Court. *Ex parte Cox*, 1833. 3 Dea. & Chit. 11 ; *Ex parte Smith, Ibid.*

The Court will not order the registrar to attend with the proceedings at the trial of an action, on behalf of a party who is a stranger to the commission. *Ex parte Munk*, 1833. 3 Dea. & Chit. 233.

A party objecting to the master's report should either present a petition to except to it, or give notice to the other side as to the nature of the objection. *Ex parte Mallard*, 1833. 3 Dea. & Chit. 243.

RE-HEARING.

See also RE-HEARING PETITION.

An application for a re-hearing must be by petition and not by mo-

tion. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 70.

On a petition for a re-hearing, the party who presents such petition opens the case. *Ex parte Cunningham*, 1833. 3 Dea. & Chit. 73. The former order in this case confirmed. See *ante*, p. 70.

The re-hearing of a former petition may be brought on, on a petition for re-hearing it, without obtaining a previous order for the re-hearing. *Ex parte Thompson, re Ecroyd*, 1834. 3 Dea. & Chit. 612; S. C. 1 M. & A. 312—324.

RENT.

See DISTRESS FOR RENT—LANDLORD AND TENANT.

REPORT.

Exceptions to.

See also REGISTRAR.

A party objecting to the master's report, should either present a petition to except to it, or give notice to the other side of the nature of the objection. *Ex parte Mallard*, 1833. 3 Dea. & Chit. 243.

REPUTED OWNERSHIP.

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account; the intestate died in 1801, and a commission issued against the bankers in 1810, notwithstanding which, the same partner continued to receive the dividends and paid them to the intestate's widow, up to the period

of his own death, which happened in 1822; some time after which, the assignees of the bankers claimed a lien on the debenture, for a debt due from the intestate to the banking-house. Held, that after so long an abandonment of any claim of lien, the assignees could not now support such claim; and that the debenture also could not be considered as having been left in the order and disposition of the bankers, having been deposited in the nature of a trust. *Ex parte Douglas*, 1833. 3 Dea. & Chit. 310.

A. is in the habit of sending skins to *B.*'s tan-yard to be dressed, with an account, as of a sale of each parcel of skins to *B.*, and *B.* renders an account of the dressed leather, as sold by him to *A.* This mode of dealing was only practised by *B.* with *A.*, nor was he in the habit of dressing skins for any other person. Held, that a quantity of these skins, which were mixed with *B.*'s general stock at the time of his bankruptcy, passed to his assignees, on the principle of reputed ownership. *Ex parte Batten*, 1833. 3 Dea. & Chit. 328.

A. in France employs *B.* in England to sell wines on commission, as well as to purchase other wines on his account in London, for which purpose he furnishes him with letters of credit. The wines were generally bought and sold by *B.* in his own name. Part of the wines consigned by *A.* were in the dock warehouses, standing in *B.*'s name, and part formed one indiscriminate stock in *B.*'s cellar. *A.* closes

the connection with *B.*, and requires him to deliver up all the wines, but *B.* neglects to comply with this requisition, and shortly afterwards becomes bankrupt:—Held, that the Court had jurisdiction to order the assignees of *B.* to deliver up these wines to *A.* *Ex parte Moldaut*, 1833. 3 Dea. & Chit. 351.

By the laws of Antigua, slaves were declared to be inheritance, and affixed to the freehold; and by 59 Geo. 3. c. 120. s. 9. no deed or instrument conveying any interest in slaves was valid, unless the registered names and descriptions of the slaves were set forth in the instrument, or in some schedule thereof. The bankrupts deposited with *B.* and Co., as security for a loan of money, a deed of conveyance to the bankrupts of a plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit:—Held, 1st, that this was nevertheless a good equitable mortgage of the slaves mentioned in the deed. 2nd, That the slaves being real property in the island of Antigua, could not be considered as within the order and disposition of the bankrupts at the time of their bankruptcy. *Ex parte Rucker*, 1834. 3 Dea. & Chit. 704; S. C. 1 Mont. & Ayr. 481.

A., who was partner with *B.*, deposited with their bankers the

deeds of a freehold cotton mill belonging to *A.*, as a security for advances made by the bankers for the use of the firm of *A.* and *B.*, and in the memorandum of deposit it was stated that the buildings were insured for 2000*l.*, and “the machinery, &c. for 2000*l.* more;” a steam engine and other machinery having been, previous to the deposit, erected by *A.* and *B.* for the purposes of their trade. *A.* and *B.* continued in possession of the premises, with all the machinery, up to the period of their bankruptcy:—Held, first, that the bankers had a lien on the steam-engine and machinery, as well as on the building. Secondly, that the steam-engine and machinery, though removeable by a tenant, as fixtures erected by him for the purposes of trade, yet being firmly attached to the walls and floors of the buildings, and being such fixtures as are frequently put up by the owners of cotton mills, and let with the mills to a tenant, were not to be considered as in the reputed ownership of the bankrupts, within the meaning of the 6 Geo. 4. c. 16. s. 72. *Ex parte Loyd, re Ogden*, 1834. 3 Dea. & Chit. 765; S. C. 1 Mont. & Ayr. 494.

Where shares of an insurance company are held in the name of the bankrupt as trustee, they are not in his reputed ownership. What is notice to the office? *Ex parte Watkins, re Kidder*, 1834. 1 Mont. & Ayr. 689.

Where the lessee for years of a house, being also possessed of the fixtures therein by separate purchase, mortgaged his term with the fixtures, and afterwards became bankrupt:—Held, that his assignee, who removed and converted them, was liable in trover by the mortgagee to pay the value of them while fixed on the demised premises. *Boydell v. M'Michael*, 1834. 3 Tyrw. 974; S. C. 1 Crompt., Mees., & Rosc. 177.

In 1797 premises in Lancashire described as "land, a dwelling-house, machine-house, and other buildings and erections," were conveyed in fee to one of several partners. The conveyance stated them to be then in the possession of that partner and another of his then partners. Machinery and utensils were afterwards placed thereon by the firm for the purpose of carrying on the business of calico printers. The machinery and utensils were firmly fixed to the freehold, yet in such a manner that they might be easily removed without material injury to themselves or the buildings. In that part of the country similar articles so fixed are commonly bought, sold, and removed, without treating them as fixtures. In taking stock yearly between 1804 and 1825, the buildings and land were valued and classed separately from the machinery and fixtures, but the whole was always dealt with and considered as partnership property. In

1828, two of the partners (then seised in fee of the freehold land and buildings under a conveyance, not mentioning machinery or fixtures) mortgaged them for a term, "and also the steam-engine, mill geering, heavy gear, millwright work, fixed machinery, and other matters and things standing and being in or upon the thereby demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same or any part thereof." They remained in possession and carried on the works until 1829, when they compounded with their creditors, and afterwards until they became bankrupts. In April 1831, their assignees sold and removed the machinery and utensils, except two steam-engines, with the first motion and main shafts attached to them, and two water-wheels, which supplied power to the rest:—Held, first, that the machinery and utensils so removed having been affixed to the inheritance for the purpose of trade only, in a place where as such they would commonly have been removed, and being in fact removable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only, which passed to the assignees of the bankrupts. Secondly, that the mortgage deed was only intended to pass that part of the machinery which, from the circumstances of its erection, necessarily became part of the freehold. *Trappes*

v. Harter, 1833. 3 Tyrw. 603; *S. C.* 2 Crompt. & Mees. 153.

The Bankrupt Act, 6 Geo. 4. c. 16. s. 72. vests in the assignees such goods whereof the bankrupt was reputed owner at the time when he became bankrupt, by the consent and permission of the true owner. But where the true owner had permitted his goods to remain in the order and disposition of *A.*, until the day before he became bankrupt, and then demanded the possession of them, which *A.* refused to deliver:—Held, that they did not pass to *A.*'s assignees. *Smith v. Topping*, 1833. 5 Barn. & Adol. 674; *S. C.* 2 Nev. & Man. 421.

A steam-engine erected for the purpose of working a colliery to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in 6 Geo. 4. c. 16. s. 72., nor had the bankrupt the actual or apparent ownership. *Coombs v. Beaumont*, 1833. 5 Barn. & Adol. 72.

S. having advanced money to *M.* received from him, by way of security, an assignment of his equitable life interest in certain stock standing in the names of three trustees under a marriage settlement, and in a mortgage vested in the same trustees. The solvency of *M.* becoming doubted, one of the trustees

and a relation of *S.* spoke to him on the subject, when *S.* in the course of the conversation, and without any view of giving validity to the security he held, told him that he held the above-mentioned assignment as a security for his advances. *M.* having afterwards become bankrupt:—Held, that this statement, though made to a person who was not acting trustee, sufficed to prevent the stock and mortgage from being in the order and disposition of *M.* at the time of his bankruptcy, and consequently from passing to his assignees. *Smith v. Smith*, 1833. 4 Tyrw. 52; *S. C.* 2 Crompt. & Mees. 231.

Under the assignment of a simple contract debt, the assignor must be considered as having the order and disposition of the debt, with the consent of the true owner, until the debtor has notice of the assignment. Such debt will, therefore, pass to the assignees under a bankruptcy, by virtue of 6 Geo. 4. c. 16. s. 72., and to the assignees under the insolvent debtors' act, 7 Geo. 4. c. 57. s. 31. *Buck v. Lee*, 1834. 3 N. & M. 580.

RESERVED BIDDING.

Under what circumstances a reserved bidding refused to assignees, on the sale of property under an equitable mortgage. *Ex parte Bernard*, 1833. 3 Dea. & Chit. 291; *S. C.* 1 M. & A. 81.

A reserved bidding allowed to assignees, on the sale of an estate which had been mortgaged by the

bankrupt. *Ex parte Ellis*, 1833. 3 Dea. & Chit. 297.

RESERVING DIVIDENDS.

Where a sum has been ordered to be paid into Court by the bankrupt in a suit in Chancery still pending against him, a claim was ordered to be entered on the proceedings for the amount, and the assignees were directed to recover dividends on that sum to be paid to the Accountant-General to the credit of the suit in Chancery. *Ex parte Farden, re Peters*, 1833. 3 Dea. & Chit. 479; S. C. 1 Mont. & Ayr. 219.

RETAINER.

A. and *B.* sue out a commission as solicitors to the petitioning creditor, and the assignees afterwards appoint *C.* to act as solicitor, but it is agreed between him and *A.* and *B.*, with the privity of the assignees, that all three shall jointly act as solicitors, and share the profits, and the assignees afterwards recognize the acting of *A.* and *B.* as such joint solicitors. Held, 1st, That this amounted to a retainer by the assignees of *A.* and *B.* as joint solicitors with *C.* 2dly, That the Court of Review has jurisdiction on the petition of *A.* and *B.* (*C.* having been served with it,) to enforce the payment, by the assignees, of the solicitors' bills of costs. 3dly, That the assignees were not liable for the payment of such costs, whether they had funds in their hands or not. *Ex*

parte Hammond, re Wooding, 1834. 3 Dea. & Chit. 626; S. C. 1 M. & A. 328.

RE-TAXATION.

See also TAXATION.

Where nearly six years had elapsed since the solicitor's bill of costs had been taxed by the Commissioners, and the assignee was a party to that taxation, and to the subsequent payments in discharge of the bills, the Court refused, on his application, to refer them for re-taxation. *Ex parte Hutchinson, re Freeman*, 1834. 3 Dea. & Chit. 829.

SALE.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency, although occasioned by the payment of the rent. *Ex parte Cocks*, 1833. 3 Dea. & Chit. 8.

The Court will not depart from the general rule, that the solicitor to the commission shall not be allowed to purchase any part of the bankrupt's property. *Ex parte Farley*, 1833. 3 Dea. & Chit. 110.

Under what circumstances a reserved bidding refused to assignees on the sale of property under an equitable mortgage. *Ex parte Bernard*, 1833. 3 Dea. & Chit. 291; S. C. 1 Mont. & Ayr. 81.

A reserved bidding allowed to assignees, on the sale of an estate which had been mortgaged by the

bankrupt. *Ex parte Ellis*, 1833. 3 Deac. & Chit. 297.

A mortgagee of a term made an equitable mortgage, and subsequently purchased the equity of redemption. Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if it be rejected by the assignees. *Ex parte Tuffnell, re Watts*, 1834. 1 Mont. & Ayr. 620.

The Court will not interfere to direct assignees how to sell the estate. *Ex parte Belcher, re Maberley*, 1834. 1 Mont. & Ayr. 478.

A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption in case any partner wished to dispose of his share. A partner deposited an attested copy of the lease, in order to give an equitable mortgage on his share to a stranger. Held, the Court could not make the usual order for sale, &c., as the partnership accounts must first be taken, which this Court has no jurisdiction to do, and the case was not otherwise free from doubt. [*Cross, J.*, dissent.] *Ex parte Broadbent, re Borron*, 1834. 1 Mont. & Ayr. 635.

In 1818, *A.* conveys Blackacre to *B.* *B.* becomes bankrupt, and his assignee conveys, in 1818, to *C.* In 1824, *A.* conveys Blackacre to *D.* It is competent to *D.*, in an ejectment brought against him by *C.*, to show that in 1818, *A.* had no legal estate in Blackacre. Whether a conveyance by assignees of a bankrupt,

where neither assignees nor bankrupt have been in possession within a year, amounts to embracery—*Quære. Doe v. Powell*, 1834. 3 Nev. & Man. 616.

A quantity of hops was purchased from the defendants in April 1831, the invoice of which contained the words "on rent." The hops remained in the sellers' warehouse, and a bill accepted by the buyer was afterwards given them at their request, which they indorsed on getting it discounted. During the running of that bill, part of the hops was delivered, in pursuance of the buyer's order, to his sub-purchaser, who paid the warehouse rent charged by the sellers. Afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonoured at maturity. Held, that though the sellers might not have a right, while the bill remained outstanding, to part with the hops remaining in their possession, the assignee of the original buyer could not maintain trover for them, without actual payment of the price agreed, as well as of the warehouse rent, he having only the right of property, without that of possession. *Miles v. Gorton*, 1834. 4 Tyrw. 295.

The Court will not exempt a mortgagee who bids from paying a deposit. *Ex parte Tatham, re Shepard*, 1833. 1 Mont. & Ayr. 335.

The Court will not order a sale by private contract, the Commissioners having power so to do. *Ex parte Ladbroke, re Baker*, 1834. 1 Mont. & Ayr. 384.

SCANDAL.

Where an affidavit is reported to be scandalous, the agent in London who files the affidavit is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Ex parte Wake*, 1833. 3 Den. & Chit. 246.

SECOND FIAT AND COMMISSION.

The petitioning creditor, after issuing a fiat, found he could not support it on account of his inability to prove the trading; the Court refused to permit another petitioning creditor to issue a second fiat before the time of proceeding in the first was expired. *Ex parte Humez, re Darkly*, 1833. 3 Den. & Chit. 493.

Although the petitioning creditor goes abroad after issuing a fiat, the Court will not permit another creditor to issue a second fiat until the time for proceeding in the first has expired. *Ex parte Medley, re Hailey*, 1833. 3 Den. & Chit. 502; S. C. 1 Mont. & Ayr. 79.

A second fiat issued against one of several partners, after a previous fiat against the other partners, cannot now be directed to the same Commissioners as those named in the first fiat, under the 6 Geo. 4. c. 16. s. 17. but must be directed to the new Commissioners appointed under the 1 & 2 Will. 4. c. 56. s. 14. *Ex parte Bogue, re Schouswer*, 1834. 3 Deac.

& Chit. 747; S. C. 1 Mont. & Ayr. 445.

It is not of course to supersede a second commission against an uncertificated bankrupt, on the application of the assignees, &c. under the first. *Ex parte Deane, re Kenton*, 1834. 1 Mont. & Ayr. 429.

SECURITY FOR COSTS.

An application for security for costs must be made before any step is taken by the party applying. *Ex parte Tull, re Davis*, 1833. 3 Den. & Chit. 503; S. C. 1 Mont. & Ayr. 80.

SERVANTS.

A clerk, though engaged at a weekly salary, is within the meaning of the 48th section of the Bankrupt Act. *Ex parte Humphreys*, 1833. 3 Den. & Chit. 114.

A clerk, who has served the bankrupt more than six months, is entitled to the allowance of six months' wages, although the bankrupt was not in fact a trader within the bankrupt laws, for more than two months out of the six. *Ex parte Gough*, 1833. 3 Den. & Chit. 189.

The guard of a stage coach hired at weekly wages, is not a servant within the meaning of the 6 Geo. 4. c. 16. s. 48. *Ex parte Skinner*, 1833. 3 Den. & Chit. 332.

A clerk hired generally by the year at a certain salary, may, upon a dissolution of contract by mutual consent, within the year, recover sa-

lary *pro rata*, without any express agreement to that effect.

The contracts of a trader with his clerks and servants are not dissolved by the issuing a commission of bankruptcy against him; therefore the clerk of a trader against whom a commission of bankruptcy issues, during a current year of the hiring of such clerk, may, after the bankrupt has obtained his certificate, recover his salary for the whole year. So, also, he may recover *pro rata* where the contract has been dissolved by mutual consent within the year, but after the issuing of the commission. The departure of the clerks upon the ceasing of the trade, is evidence of a dissolution of such contract. *Thomas v. Williams*, 1884. 3 Nev. & Man. 545.

SERVICE.

See also PETITION, *Service of*.

Before a motion is made that the petition of the bankrupt for a supersedeas shall be dismissed, on the ground of his being out of the jurisdiction of the Court, the respondent should serve the bankrupt's agent with notice of the motion, having previously obtained an order that service on the agent shall be good service. *Ex parte Drake*, 1833. 3 Dea. & Chit. 284.

SET-OFF.

On the 2d of January 1832, the defendants, bankers, received from B. C. a bill of exchange for 760*l.*,

drawn by M. on his partners, indorsed by him to B. C., and by B. C. to defendants. On the 6th the bill became due, and M. having failed the same day, the bill was dishonoured. On the 7th the defendants, who then had in their hands sufficient assets of B. C. to cover the bill, returned it to B. C., with a receipt for the amount indorsed on it, and having on the 2nd entered the bill to the credit of B. C., now entered it as a debit. The defendants were also the acceptors of a bill for 1000*l.*, drawn by B. C., indorsed to M., and due on the 12th of January. On the 9th B. C. sent back the 760*l.* bill to the defendants, with instructions to carry into effect the views expressed by B. C. in a letter addressed to defendants on the 6th in anticipation of M.'s failure. The letter was as follows:—"We think that you would be entitled to retain the 1000*l.* as a set-off for the 760*l.*, at all events we will trust to your doing the best for us in this matter." In an action brought against the defendants by the assignees of M., on the 1000*l.* bill, the jury having found that the transaction between the defendants and B. C. on the 760*l.* bill was closed on the 7th:—Held, that they could not set off that bill against the 1000*l.* bill. *Belcher v. Lloyd*, 1833. 10 Bing. 310; S. C. 3 Moo. & Sc. 822.

J. apprenticed his son to the bankrupt two years before his bankruptcy, and agreed to pay a premium of 200*l.* J. was in partnership with

T., and the bankrupt owed them a joint debt exceeding the amount of the apprentice fee due from *J.* to the bankrupt; *J.* cannot set off the apprentice fee against the joint debt due from the bankrupt to *J.* and *T.* The Court, under these circumstances, ordered 100*l.* to be paid by *J.* to the assignees, together with the costs of the petition. *Ex parte Soames*, 1833. 3 Dea. & Chit. 320.

Where a creditor has a clear legal right of set-off in an action brought against him by the assignees, the Court will order the action to be stayed, and refer it to the Commissioners to take the account and state the balance. *Ex parte Glegg, re Douglas*, 1833. 3 Dea. & Chit. 505; S. C. 1 M. & A. 91.

After the bankruptcy of *A.*, and before his certificate, *B.*, one of his creditors, purchases goods from him. In an action brought by *A.* after obtaining his certificate, for the price of the goods, the old debt cannot be set-off, being barred by the certificate. *Hayllar v. Sherwood*, 1833. 1 Nev. & Man. 401.

SETTING ASIDE PURCHASE.

See also FRAUD, FID. SIT.

Although it is the usual and the prudent practice for a mortgagee to apply to the Court for leave to bid, the Court will not rescind the sale where the mortgagee has purchased the property without such leave, if the purchase has been made by him *bond fide*. *Ex parte Ashley, re Bell*,

1833. 3 Dea. & Chit. 510; S. C. 1 M. & A. 82.

SHERIFF.

Case lies for a judgment creditor against a sheriff for not selling within a reasonable time after a seizure under a *fi. fa.* But the plaintiff in such case can recover nominal damages only, unless actual injury be proved.

Where, therefore, the sheriff delays selling for an unreasonable time, and before the sale, but after the time when he ought to have sold, receives notice of a fiat in bankruptcy against the execution debtor, and afterwards returns that he has the levy money in his hands, but that he has received such notice, it lies upon the plaintiff to prove the trading, act of bankruptcy &c., so as to show that, by reason of the sheriff's delay, the right of property in the goods seized passed before the sale into other hands, and that the plaintiff's execution had been thereby frustrated. *Bales v. Wingfield*, 1833. 10 Bing. 831.

A judgment on a warrant of attorney is not within the protection of 1 *Will.* 4. c. 7. s. 7., and therefore is within the 108th section of 6 *Geo.* 4. c. 16. In assumpsit for money had and received against the sheriff to recover the proceeds of a sale under a *fi. fa.* issued upon a judgment not protected by 1 *Will.* 4. c. 7. s. 7. the sheriff was held liable, where notice of an act of bankruptcy committed before the sale, and of a docket struck thereon, was given to him when the

sale was nearly completed, after which he received the proceeds and handed them over to the execution creditor. *Crossfield v. Stanley*, 1832. 1 Nev. & Man. 668; S. C. 4 Barn. & Adol. 87.

Whether a sheriff, who, in obedience to a fieri facias, seizes the goods of a person who has committed an act of bankruptcy previously to issuing the execution, is liable in trover by the assignees of the latter? *quære. Garland v. Carlisle*, 1833. 3 Tyrw. 705; S. C. 2 Crompt. & Mee. 31.

SHORT ORDER TO PAY.

After an order to pay within a specified time, the next order is to pay within four days or stand committed. This is of course at the office, but if circumstances render an application to the Court necessary, notice must be given to the other side. *Ex parte Solomons, re Maberly*, 1833. 1 Mont. & Ayr. 269, n.

SLAVES.

By the laws of Antigua slaves were declared to be inheritance and affixed to the freehold; and by 59 Geo. 3. c. 120. s. 9., no deed or instrument conveying any interest in slaves was valid unless the registered names and descriptions of the slaves were set forth in the instrument, or in some schedule thereof. The bankrupts deposited with R. & Co. as security for a loan of money, a deed of conveyance to the bankrupts of a

plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit:—Held, 1st, that this was nevertheless a good equitable mortgage of the slaves mentioned in the deed. 2dly, that the slaves being real property in the Island of Antigua, could not be considered as within the order and disposition of the bankrupts at the time of their bankruptcy. *Ex parte Rucker*, 1834. 3 Dea. & Chit. 704; S. C. 1 M. & A. 481.

SOLICITOR AND CLIENT.

Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate. But if the attorney committed fraud in the receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officer, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct. The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to show cause why he

should not pay over the money. *Re Bonner*, 1833. 4 Barn. & Adol. 811.

SOLICITOR TO FIAT.

The solicitor is bound to deliver up the proceedings to a fresh solicitor appointed by the surviving assignee, without waiting until a fresh assignee is chosen in the room of one who is dead. *Ex parte Ackroyd*, 1833. 3 Dea. & Chit. 21.

The Court will not depart from the general rule, that the solicitor to the commission shall not be allowed to purchase any part of the bankrupt's property. *Ex parte Farley*, 1833. 3 Dea. & Chit. 110.

A. and *B.* sue out a commission as solicitors to the petitioning creditor, and the assignees afterwards appoint *C.* to act as solicitor; but it is agreed between him and *A.* and *B.*, with the privacy of the assignees, that all three shall jointly act as solicitors, and share the profits, and the assignees afterwards recognize the acting of *A.* and *B.* as such joint solicitors. Held, 1st, That this amounted to a retainer by the assignees of *A.* and *B.* as joint solicitors with *C.* 2nd, That the Court of Review had jurisdiction on the petition of *A.* and *B.* (*C.* having been served with it) to enforce the payment by the assignees of the solicitors' bill of costs. 3d, That the assignees were not liable for the payment of such costs, whether they had funds in their hands or not. *Ex parte Hammond, re Wooding*, 1834.

3 Dea. & Chit. 626; *S. C.* 1 M. & A. 328.

SOLICITOR.

Generally.

See also ATTORNEY.

The Court refused to make an order that service of a petition against an attorney for an order to pay certain costs, for which he had been declared liable, by leaving a copy at his chambers, should be deemed good service. *Re Sandys*, 1833. 3 Dea. & Chit. 34.

Where unfounded charges of corruption were brought against Commissioners by a petitioner, who appeared to be the tool of other parties, the Court ordered the Commissioners their "costs, charges, and expenses," and suspended the order until the attorney for the petitioner should show cause why he should not personally pay the costs. *Ex parte Williams*, 1833. 3 Dea. & Chit. 103.

The Court will only exercise a summary jurisdiction over an attorney, when he is acting in the character of an officer of the Court, and not in an ordinary case of attorney and client. *Ex parte Bull*, 1833. 3 Dea. & Chit. 116.

Where an affidavit is reported to be scandalous, the agent in London who files the affidavit is responsible for the costs, as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Ex parte Wake*, 1833. 3 Dea. & Chit. 246.

Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate. But if the attorney committed fraud in receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officers, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct. The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to show cause why he should not pay over the money. *Re Bonner*, 1833. 4 Barn. & Adol. 811.

SPECIAL CASE.

Quære, As to the signature of a special case, on appeal by one of the judges of the Court of Review? *Ex parte Hawley*, 1833. 3 Dea. & Chit. 234.

After a special case has once been certified by the chief judge, the Court has no jurisdiction to disallow it. *Ex parte Hawley*, 1834. 3 Dea. & Chit. 655.

On an appeal from the Court of Review, on a special case, the Chancellor will not at the hearing permit the appellant to present a petition for liberty to proceed "otherwise"

for the purpose of rectifying an error in the settlement of the special case; the determination of the judge is final as to the settlement of it. *Ex parte Low, re Hobson*, 1834. 1 Mont. & Ayr. 189.

It is imperative on the judges of the Court of Review to sign a special case. *Ex parte Turner, re Mackenzie*, 1 Mont. & Ayr. 368; *sed quære*.

SPECIFIC PERFORMANCE.

A., before his bankruptcy, agrees to take a lease of a cotton mill, and enters into possession. After his bankruptcy, one of his assignees takes possession, and agrees to accept the lease; a draft of which was sent to the assignees, containing covenants personally binding on them during the whole of the term, and one in particular to prevent them from assigning without the licence of the lessor:—Held, that the assignees were not bound to accept of such a lease; and even if they were, that the Court of Review had no jurisdiction to compel a specific performance of the agreement. *Ex parte Lucas*, 1833. 3 Dea. & Chit. 144; S. C. 1 Mont. & Ayr. 93.

Upon a sale of the bankrupt's mortgaged property made under the general order, the Court of Review has jurisdiction to enforce a specific performance of the contract by the purchaser. *Ex parte Sidebotham*, 1834. 3 Dea. & Chit. 818; S. C. 1 M. & A. 655.

A purchaser who, in the full knowledge of certain objections to the title, grants a lease of the property to a third party, must be taken to have waived the objections to the title. *Ex parte Sidebotham*, 3 Dea. & Chit. 818; S. C. 1 M. & A. 655.

An agreement for a lease is not annulled by the bankruptcy of the intended lessee. *Morgan v. Rhodes*, 1834. 1 Mont. & Ayr. 214.

An agreement for a lease is not annulled by the insolvency of the intended lessee. *Crosby v. Tooke*, 1833. 1 Mont. & Ayr. 215, note. S. C. 1 Mylne & Keen, 431.

Where a landlord agrees to grant a lease to *A.*, his executors, administrators, and assigns, upon certain conditions, and *A.* assigns his interest in the contract to *B.*, and then becomes bankrupt, *B.*, on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and his right is not affected by a proviso, that in case of the bankruptcy of *A.*, the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of *A.*'s estate. *Morgan v. Rhodes*, 1834. 1 Mylne & Keen, 435.

STATUTE, CONSTRUCTION OF.

See also FRAUDULENT ASSIGNMENT
—REPUTED OWNERSHIP.

A clerk, though engaged at a

weekly salary, is within the meaning of the 48th section of the Bankrupt Act. *Ex parte Humphreys*, 1833. 3 Dea. & Chit. 114.

A clerk, who has served the bankrupt more than six months, is entitled to the allowance of six months' wages, although the bankrupt was not in fact a trader, within the bankrupt laws, for more than two months out of the six. *Ex parte Gough*, 1833. 3 Dea. & Chit. 189.

Under the 6 Geo. 4. c. 16. s. 96. the Court have a general power, upon petition, to direct the proceedings to be entered of record. *Ex parte Thomas*, 1833. 3 Dea. & Chit. 292.

The guard of a stage coach, hired at weekly wages, is not a servant within the meaning of the 6 Geo. 4. c. 16. s. 48. *Ex parte Skinner*, 1833. 3 Dea. & Chit. 332.

A judgment on a warrant of attorney is not within the protection of 1 Will. 4. c. 7. s. 7; and therefore is within the 108th section of 6 Geo. 4. c. 16. In assumpsit for money had and received against the sheriff, to recover the proceeds of a sale under a *fi. fa.* issued upon a judgment not protected by 1 Will. 4. c. 7. s. 7. the plaintiff was held liable, where notice of an act of bankruptcy committed before the sale, and of a docket struck thereon, was given to him when the sale was nearly completed, after which he received the proceeds and handed them over to the execu-

tion creditor. *Ex parte Crossfield, re Stanley*, 1832. 1 Nev. & Man. 668; S. C. 4 Barn. & Ad. 87.

Section 132 of 6 Geo. 4. c. 16. as to interest, is not retrospective. *Ex parte Phillips*, 1834. 1 Mont. & Ayr. 674.

The Court can reverse the decision of a Subdivision Court, on a matter of fact as to expunging a proof, that not being within sect. 30 of 1 & 2 Will. 4. c. 56. *Ex parte Baldwin, re Smith*, 1834. 1 Mont. & Ayr. 615.

By the 6 Geo. 4. c. 16. s. 127., it is provided, that if any person shall have been discharged by certificate, or shall have compounded with his creditors, or who shall have been discharged by any insolvency act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce sufficient to pay his creditors 15s. in the pound, such certificate shall only protect his person from arrest, but his future estate shall vest in his assignees under the said commission:—Held, that the clause was retrospective, and that it applied to discharges by bankruptcy or insolvency before the passing of the act, as well as to discharges obtained subsequent to the passing of the act. *A.*, in the year 1815, was discharged by an insolvent act, and in 1830 obtained his certificate under a commission of bankrupt issued in 1829, under which commission his estate produced less than sufficient to pay

15s. in the pound. *A.*, in the year 1832, opened an account with the Bank of England, and a sum of 294l. 15s. was deposited by him in the bank:—Held, that an action for money had and received, brought by the assignees under the commission against the Governor and Company of the Bank of England, to recover the amount so deposited, was maintainable. *Elston v. Braddick*, 1834. 2 Crompt. & Mees. 435; S. C. 4 Tyrw. 122.

STATUTE OF LIMITATIONS.

See also LENGTH OF TIME.

Quære, Whether simple contract creditors be barred by the statute of limitations after a supersedeas? *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 300.

STAYING ACTION AT LAW.

See also ACTIONS.

Where a creditor has a clear legal right of set-off in an action against him by the assignees, the Court will order the action to be stayed, and refer it to the Commissioners to take the account and state the balance. *Ex parte Glegg, re Douglas*, 1833. 3 Dea. & Chit. 505; S. C. 1 Mont. & Ayr. 91.

STAYING ADVERTISEMENT.

An application by the bankrupt to stay the advertisement in the Gazette, on his affidavit, merely denying the existence of the petitioning creditor's debt, or the committal of

any act of bankruptcy, without any allegation of his solvency, will not be entertained unless the proceedings be produced for the inspection of the Court. *Ex parte Pownall*, 1834. 3 D. & Chit. 723; S. C. 1 M. & A. 314.

The Court of Review will stay the insertion of the advertisement in the Gazette. *Ex parte Lavender*, 1834. 1 Mont. & Ayr. 699.

Where there are not the requisites to support a fiat, the Chancellor will recommend to the Commissioner to hear counsel against the adjudication; and if the bankruptcy be already found, will stay the insertion of the advertisement in the Gazette, and supersede. *Ex parte Nokes*, 1834. 1 Mont. & Ayr. 461.

STAYING CERTIFICATE.

See also CERTIFICATE—PETITION TO STAY CERTIFICATE.

On a petition for leave to prove and stay the bankrupt's certificate, the Court will, where the circumstances are suspicious, direct a meeting to enable the creditor to prove, and order the Commissioners to review the certificate. *Ex parte Bray, re Bridgwood*, 1833. 3 Dea. & Chit. 495.

STAYING PROCEEDINGS.

Plaintiff being liable to defendant for the costs of a nonsuit, issued a fiat of bankruptcy against the defendant. The Court refused to stay defendant's proceedings in the action.

Eicke v. Nokes, 1834. 1 Bing. New Cases, 69.

STEAM-ENGINE.

A., who was a partner with *B.*, deposited with their bankers the deeds of a freehold cotton mill belonging to *A.*, as a security for advances to be made by the bankers for the use of the firm of *A.* and *B.*; and in the memorandum of deposit it was stated that the buildings were insured for 2000*l.*, and "the machinery &c. for 2000*l.* more;" a steam engine and other machinery having been, previous to the deposit, erected by *A.* and *B.* for the purposes of their trade. *A.* and *B.* continued in possession of the premises, with all the machinery, up to the period of their bankruptcy:—Held, 1st, That the bankers had a lien on the steam engine and machinery, as well as on the buildings. 2. That the steam-engine and machinery, though removable by a tenant, as fixtures erected by him for the purpose of his trade, yet being firmly attached to the walls and floors of the buildings, and being such fixtures as are frequently put up by the owners of cotton mills, and let with the mill to a tenant, were not to be considered as in the reputed ownership of the bankrupts, within the meaning of the 6 Geo. 4. c. 16. s. 72. *Ex parte Loyd, re Ogden*, 3 Dea. & Chit. 765. S. C. 1 Mont. & Ayr. 494.

A steam-engine erected for the purpose of working a colliery, to be

used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in 6 G. 4. c. 16. s. 72., nor had the bankrupt the actual or apparent ownership. *Coombs v. Beaumont*, 1833. 5 Barn. & Adol. 72.

STOCK, TRANSFER OF.

The surviving trustee under a marriage settlement becomes bankrupt, and is outlawed. On the application of the *cestui que trusts*, the Court ordered the assignees to transfer the trust stock to new trustees. *Re Remington*, 1833. 3 Dea. & Chit. 24.

STRANGER.

Any party who can show that he sustains a grievance from a fiat, may petition to supersede it, notwithstanding he claims adversely to it. A trustee, therefore, under a trust-deed which the fiat would overreach, may petition for this purpose. *Ex parte Jones, re Lamplough*, 1834. 3 Dea. & Chit. 697; S. C. 1 Mont. & Ayr. 440.

A stranger to the commission obtained an assignment of the creditor's proofs, and therewith bought part of the bankrupt's estate from the assignees:—Held, that the Court had no jurisdiction to set aside the purchase. [*Cross, J. dissent.*] *Ex*

parte Holder, 1834. 1 Mont. & Ayr. 518.

The Court will not vary the minutes of an order on the application of persons not parties to or bound by it. *Ex parte De Begnis, re Chambers*, 1834. 1 Mont. & Ayr. 279.

SUBDIVISION COURT.

A bankrupt having been committed by one of the London Commissioners to the custody of the messenger, for not answering satisfactorily, was brought up before two Commissioners, and committed by them to Newgate:—Held, that the commitment was illegal, inasmuch as the bankrupt ought to have been brought up and re-examined before a Subdivision Court consisting of three Commissioners, who must be all present at such re-examination, though they need not be unanimous in the sentence of commitment. On an application for a bankrupt's discharge by habeas corpus, an affidavit may be read stating circumstances which are not set forth in the warrant of the Commissioners. *Ex parte Lampon*, 1834. 3 Dea. & Chit. 751; S. C. 1 Mont. & Ayr. 245.

The Subdivision Court cannot commit on an adjourned examination, after merely asking "do you abide by your former answers?"—the party must be examined. *Ex parte Bardwell, re Venables*, 1834. 1 Mont. & Ayr. 193.

The Court can reverse the decision of a Subdivision Court, on a matter of fact as to expunging a proof, that not being within sect. 30 of 1 & 2 Will. 4. c. 56. *Ex parte Baldwin, re Smith*, 1834. 1 Mont. & Ayr. 615.

SUIT IN EQUITY.

Where a sum has been ordered to be paid into Court by the bankrupt in a suit in Chancery still pending against him, a claim was ordered to be entered on the proceedings for that amount, and the assignees were directed to reserve dividends on that sum to be paid to the Accountant-General to the credit of the suit in Chancery. *Ex parte Farden, re Peters*, 1833. 3 Dea. & Chit. 479; S. C. 1 Mont. & Ayr. 219.

Where the bankrupt had been ordered to pay a sum into Court in a suit in Chancery pending at the time of his bankruptcy, it was ordered by the Court of Review that a claim should be entered for that sum on behalf of the plaintiff in the suit, and that the dividends on that sum should be paid into the Court of Chancery, and invested in the name of the Accountant-General. *Ex parte Hancock, re Gilburd*, 1833. 3 Dea. & Chit. 523; S. C. 1 Mont. & Ayr. 220.

In a suit by the assignees of a bankrupt's or insolvent's estate, it is not competent to the defendant to object that the suit has been instituted without the consent of the

major part in value of the creditors, as required by the Bankrupt and Insolvent Debtors' Acts. The judgment in such a suit will bind the creditors, but the assignees take upon themselves the responsibility that the suit has been properly instituted and properly conducted. *Ex parte Piercy, re Roberts*, 1832. 1 Myl. & Keen, 4.

The consent of the creditors of a bankrupt to the institution of a suit by his assignees, though filed amongst the proceedings in the bankruptcy, must be proved. *Smith v. Briggs*, 1832. 5 Sim. 391. *Sed quære, see Ex parte Evans*, 3 Dea. & Chit. 470; *Jones v. Yates*, 3 Y. & J. 373; *Piercy v. Roberts*, 1 Mylne & Keen, 4.

SUPERSEDEAS.

See also PETITION TO ANNUL—FIAT, ANNULLING.

Where a creditor gave a power of attorney in general terms, but without any express power to consent to a supersedeas, and the signature of the creditor himself to such consent was easily attainable:—Held, that his own signature ought to be procured. *Re Sampson*, 1833. 3 Dea. & Chit. 198.

On a petition by a creditor to supersede, on the ground of concert, before the passing of the Bankruptcy Court Act, the Lord Chancellor had directed an issue, which was found in favour of the commission. The assignees then presented a petition

for their costs, and the creditor a petition for a new trial. Upon the hearing of these petitions the Court of Review being satisfied of the fact of concert, thought no new trial was necessary, and ordered the commission to be superseded. [Dissent. Sir J. Cross.] *Ex parte Harwood*, 1833. 3 Dea. & Chit. 252. But see the next case, *ibid.* 263.

Where, on a petition to supersede, the Lord Chancellor had directed the trial of an issue, and the verdict was in favour of the commission:—Held, that the Court of Review could not supersede the commission, on a petition for costs, and a cross petition for a new trial. The Lord Chancellor has still a substantive control in cases of supersedeas, or annulling a fiat, although the question may not come before him by way of appeal. *Ex parte Keys*, 1834. 3 Dea. & Chit. 263; S. C. 1 Mont. & Ayr. 226.

A trader, being in debt to several persons, leaves the country, in June 1831, for America, with some intention of returning, but does not actually return, nor does he make provision for the payment of all his debts. In September 1833, one of the creditors, whose debt was unprovided for, issues a fiat against him, which the bankrupt, by his agent in this country, after the forty-second day, petitions to supersede:—Held, [dissent. Sir J. Cross,] that the fiat could not be superseded without the surrender of the bankrupt:—Held

also, *per tot. Cur.*, that the continued absence of the bankrupt, under these circumstances, amounted to an act of bankruptcy. *Ex parte Kirkman*, 1833. 3 Dea. & Chit. 450; S. C. 1 M. & A. 709.

All the creditors assented to a supersedeas but one, for 2*l.* 14*s.* 2*d.*, who was abroad: supersedeas ordered, on depositing that sum with the Registrar, and a sum to meet the expense of taking it out of Court. *Re Brecknell*, 1833. 1 Mont. & Ayr. 80.

The Court will supersede where all the creditors consent, and the bankrupt has paid 20*s.* in the pound, though his examination has been adjourned *sine die*. *Ex parte Gudge*, 1831. 1 Mont. & Ayr. 341.

A commission held, under the circumstances, not supersedable, though there were not the requisites to support it. *Ex parte Munk*, 1834. 1 Mont. & Ayr. 612.

Where an action has been fairly tried, and the verdict is against the commission, and the bankrupt is abroad, the fiat may be superseded on the petition of the petitioning creditor, though the bankrupt has not surrendered. *Ex parte Foulger, re Palmer*, 1834. 1 M. & A. 457.

It is not of course to supersede a second commission against an uncertificated bankrupt, on the application of the assignees, &c. under the first. *Ex parte Davis, re Kenton*, 1834. 1 M. & A. 420.

Quære, Whether simple contract creditors be barred by the statute of

limitations after supersedeas. *Ex parte Davy, re Chambers*, 1834. 1 Mont. & Ayr. 300.

An action for money had and received lies against an official assignee appointed by the Court of Review, to recover money received by him while acting under a void commission, and not paid into the Bank of England, as directed by the 1 & 2 Will. 4. c. 56. s. 22. *Munk v. Clarke*, 1833. 3 Moore & Sco. 463.

SURETY.

See also PRINCIPAL AND SURETY.

B. and Co., being largely indebted to *R. and Co.*, indorse to them various bills, which had been drawn or indorsed by *C. and Co.* for the accommodation of *B. and Co.* *B. and Co.* and *C. and Co.* respectively become bankrupt, and *R. and Co.* prove the bills under each commission:—Held, that the estate of *C. and Co.* was a security to make good the amount of principal and interest due to *R. and Co.* from *B. and Co.*, and that *R. and Co.* were entitled to receive dividends on their proof under *C. and Co.*'s commission, until not only the balance of the principal sum due from *B. and Co.* but also all interest thereon, was fully satisfied. *Ex parte Reed, re Gregory*, 1833. 3 Dea. & Chit. 481.

SURRENDER.

See also BANKRUPT'S SURRENDER.

Where an action has been fairly tried, and the verdict is against the

commission, and the bankrupt is abroad, the fiat may be superseded on the petition of the petitioning creditor, though the bankrupt has not surrendered. *Ex parte Fowler, re Palmer*, 1834. 1 M. & A. 457.

TAXATION.

An order was refused to tax a messenger's bill which had been paid five years ago, where there was no recent discovery of any fraudulent charge contained in it. *Ex parte Willment*, 1833. 3 Dea. & Ch. 364; S. C. 1 M. & A. 45.

On a petition by creditors to tax the bills of several solicitors, who had been successively employed by the assignees, the Court made the order as prayed, notwithstanding the bills had been previously taxed by the Commissioners, and paid by the assignees. *Ex parte Brown, re Lloyd*, 1833. 3 Dea. & Chit. 496.

Solicitors bills, though allowed by Commissioners, and paid by assignees, ordered to be taxed, where objectionable items pointed out. *Ex parte Jourdain, re Swainson*, 1834. 3 Dea. & Chit. 637.

An application that the officer of the Court may be directed to review his certificate as to the taxation of costs, may be made by motion. It is not an objection to such application, that the amount of the taxed costs has not been paid into Court, although it may be proper to make such payment one of the terms of the order for re-taxation. *Ex parte Ri-*

chardeon, re Consett, 1834. 3 Deac. & Chit. 735 ; S. C. 1 Mont. & Ayr. 377.

Where nearly six years had elapsed since the solicitor's bill of costs had been taxed by the Commissioners, and the assignee was a party to the taxation, and to the subsequent payments in discharge of the bills, the Court refused his application, to refer them for re-taxation. *Ex parte Hutchinson, re Freeman*, 1834. 3 Dea. & Chit. 829.

Creditors may petition to tax the solicitor's bill though paid, the assignees having been guilty of dereliction of duty in not filing the bills with the proceedings. *Ex parte Castle, re Payne*, 1834. 1 M. & A. 665.

TENDER.

A tender made to the petitioning creditor of the payment of his debt, after a docket has been already struck against the bankrupt, although before the fiat was actually issued, is not sufficient to defeat the fiat. *Ex parte Jones, re Lamplough*, 1834. 3 Dea. & Chit. 697 ; S. C. 1 M. & A. 442.

TIME.

Notice must be given for time to answer affidavits, unless the motion is made when the petition is called on. *Ex parte Binns*, 1833. 3 Dea. & Chit. 189:

A formal objection to a notice of motion is waived by the party appearing, and requesting further time to oppose it. *Ex parte Morland*, 1833. 3 Dea. & Ch. 248.

TITLE.

See also SPECIFIC PERFORMANCE.

Upon a sale of the bankrupt's mortgaged property, made under the general order, the Court of Review has jurisdiction to enforce a specific performance of the contract by the purchaser. *Ex parte Sidebotham*, 3 Dea. & Chit. 818 ; S. C. 1 Mont. & Ayr. 655.

A purchaser, who, with full knowledge of certain objections to the title, grants a lease of the property to a third party, must be taken to have waived the objections to the title. *Ibid.*

TRADING.

R., a livery-stable keeper, bought provender, and sold it to his customers and any one who applied for it, "as is done in all livery-stables":—Held a sufficient trading to subject him to the bankrupt laws. *Cannan v. Denew*, 1833. 10 Bingh. 292 ; S. C. 3 Moore & Sco. 761.

In a case within the 92d section of the Bankrupt Act, (6 Geo. 4. c. 16.) where the assignees went into evidence of the trading in consequence of a notice to dispute, without advertising to the section or relying upon the depositions, and having failed to establish the trading, were nonsuited, the Court refused to set the nonsuit aside. *Johnson v. Piper*, 1833. 2 Nev. & Man. 672.

TRAVELLING EXPENSES.

See also COMMISSIONERS FEES.

An assignee is entitled to be al-

lowed for his travelling expenses incurred by him subsequent to the choice of assignees. *Ex parte Lovegrove, re Cooper*, 3 Dea. & Chit. 763.

TRIAL AT LAW.

See also ACTION.

The Court will not order the Registrar to attend with the proceedings, at the trial of an action on behalf of a party who is a stranger to the commission. *Ex parte Munk*, 1833. 3 Dea. & Chit. 33.

TRUST.

See also REPUTED OWNERSHIP.

A. procures goods, which he agrees with *B.* and *C.* shall be shipped on the joint adventure of the three, and then draws bills on *B.* and *C.* for the amount of the costs of the goods, which they accept, *A.* engaging to renew the bills until the return proceeds for the goods are received. *B.* and *C.* manage the shipment, and direct the consignee to forward the account of the return sales to themselves. *A.* then applies to *D.* to discount two of these bills, and, to induce him to do so, undertakes that the proceeds of the goods shall be applied in liquidation of the bills; which undertaking *D.*, after discounting the bills, communicated to *B.* and *C.* All the parties became bankrupt, and part of the return proceeds came to the hands of the assignee of *B.* and *C.*:—Held, that the proceeds were clothed with a trust for the payment of the bills,

and that the assignees of *B.* and *C.* were bound to pay over such proceeds to the assignees of *D.* *Ex parte Copeland*, 1833. 3 Dea. & Chit. 199; *S. P. Ex parte Prescott*, id. 218; *S. C.* 1 Mont. & Ayr. 316.

A. supplies goods at his own cost to *B.* and *C.*, which it is agreed shall be shipped on the joint account of the three, and that *A.* shall draw bills on *B.* and *C.* on account of the return proceeds, he undertaking to renew the bills until funds came round so as to keep *B.* and *C.* out of cash advances. *B.* and *C.* accept the bills, and consign the goods to their correspondent abroad, with directions to transmit the account of sales and the proceeds to themselves. *A.* discounts the bills with parties who have no knowledge of the bills being drawn on account of the joint shipment, and are not made acquainted with that circumstance until after the respective bankruptcies of *A.* and of *B.* and *C.*:—Held, that the bill-holders have nevertheless a lien on the return proceeds of the shipment which come to the hands of the assignees of *A.*, *B.*, and *C.*, subsequently to their bankruptcy. [Sir *J. Cross* dubit.] *Ex parte Prescott*, 1854. 3 Dea. & Chit. 218; *S. C.* 1 Mont. & Ayr. 316.

The Court will not take a trust deed out of the possession of the bankrupt's trustees. *Ex parte Holder*, 1834. 3 Dea. & Chit. 276.

The surviving trustee under a marriage settlement, becomes bankrupt, and is outlawed. On the ap-

plication of the *cestui qui trusts* the Court ordered the assignees to transfer the trust stock to new trustees. *Re Remington*, 1833. 3 Dea. & Chit. 24.

Any party who can show that he sustains a grievance from a fiat, may petition to supersede it, notwithstanding he claims adversely to it. A trustee, therefore, under a trust deed, which the fiat would overreach, may petition for this purpose. *Ex parte Jones, re Lamplough*, 1834. 3 Dea. & Chit. 697; S. C. 1 M. & A. 442.

S. having advanced money to M., received from him, by way of security, an assignment of his equitable life interest in certain stock standing in the names of three trustees under a marriage settlement, and in a mortgage vested in the same trustees. The solvency of M. becoming doubted, one of the trustees and a relation of S. spoke to him on the subject, when S. in the course of the conversation, and without any view of giving validity to the security he held, told him that he held the above-mentioned assignment as a security for his advances. M. having afterwards become bankrupt,—Held, that this statement, though made to a person who was not the acting trustee, sufficed to prevent the stock and mortgage from being in the order and disposition of M. at the time of his bankruptcy, and consequently from passing to his assignees. *Smith v. Smith*, 1833. 4 Tyrw. 52; S. C. 2 Crompt. & Mees. 231.

Under a fiat against a bankrupt, one person allowed to prove on behalf of a large number of holders of 11. notes, not interfering as to the assignee or the certificate. *Ex parte Gordon, re Maberly*, 1834. 1 Mont. & Ayr. 282.

UNCLAIMED DIVIDENDS.

Unclaimed dividends can only be ordered to be divided among all the other creditors generally, and not among a particular class of creditors. *Ex parte Lackington*, 1833. 3 Dea. & Chit. 331.

After an order was made for the distribution of unclaimed dividends, fresh assets came to the hands of the assignees, which enabled them to make a further dividend:—Held, that the further dividend ought to be declared on the debts of all the creditors, including those who had not claimed the former dividend, unless in the interim any of the non-claimants had renewed their proofs, in which case they must be placed *pari passu* with the other creditors; but the Commissioners ought not out of the further assets to lay aside a sum equivalent to the dividends already unclaimed, as a fund in reserve to meet any future renewal of the proofs. *Ex parte Mowbray, re Surtees*, 1834. 3 Dea. & Chit. 552; S. C. 1 Mont. & Ayr. 300.

USURY.

A. lends B. money to enable him to commence business, at five per cent.

interest. After the loan, *B.* agrees to pay to *A.* one-eighth of the annual profits, by monthly payments, which offer *A.* accepts, and *B.* accordingly makes several monthly payments, for which *A.* gives *B.* receipts on account. Held, that the balance of the principal and interest due from *B.* to *A.*, was a good petitioning creditor's debt, not arising out of a partnership, nor affected by usury. *Ex parte Briggs*, 1833. 3 Dea. & Chit. 367; S. C. 1 Mont. & Ayr. 46.

Where sums of money advanced, and to be advanced, are secured by deed, and any of the dealings then contemplated by the parties are tainted with usury, the deed is wholly void as a security, although the legal debt is not impeached. *A.* employs *B.* as a calico printer, and before the accounts for printing become due, from time to time advances him various sums of money, charging him, besides interest, with 1*l.* 10*s.* per cent. as a trade premium, which it was customary for persons in the same trade to take under the like circumstances. *A.* was also in the habit of paying debts owing by *B.* to other persons, before they became due, when *A.* deducted the usual discount, but charged *B.* with the full amount, besides interest and the trade premium above mentioned. *Semble*, that both these modes of dealing were usurious; they were, however, at least of so suspicious a nature, that the Court declined to make an order for the sale of the property under the deed, but

directed an action of ejectment to be brought by *A.* against the assignees. *A.*, having succeeded upon the trial, applied for the costs of the petition, which the Court, under these circumstances, declined to grant, the petition being against the judgment of the Commissioners. *Ex parte Millington*, 1833. 3 Dea. & Chit. 298; S. P. & S. C. 1 Mont. & Ayr. 114.

A customer applied to his bankers to lend him 4000*l.* at five per cent., which the bankers agreed to do. He then asked the bankers what balance he was expected to keep with them? they answered, that he could not keep less than 1000*l.*; upon which the customer said, "very well, they might leave it to him." The customer paid into, and drew out from the banking-house in one year, various sums amounting to 108,060*l.* Held, that under these circumstances the loan was not usurious. *Ex parte Geddes, re Holthouse*, 1834. 3 Dea. & Chit. 638; S. C. 1 M. & A. 385.

VACATING ASSIGNMENT.

Upon a new choice of assignees there is no necessity to vacate the assignment under a commission issued prior to 1 & 2 Will. 4. c. 56. *Smith v. De Tastet*, 1834. 1 M. & A. 370.

VARYING MINUTES.

The Court will not vary the minutes of an order, on the application of persons not parties to or bound by it. *Ex parte De Begnis, re Chambers*, 1834. 1 Mont. & Ayr. 279.

VENDOR AND PURCHASER.

See also SALE.

F. and Co. sold cochineal to *John W.*, for which a small part of the price was paid in cash, and the remainder by two bills at four months, but the cochineal was to remain in the hands of *F. & Co.*, as a security for the payment of the bills. The bills not being paid when due, *John W.* sent *F.* and Co. two other bills, drawn by himself on *Joshua W.*, for which no consideration was given to *Joshua W.*, the acceptor. Before these bills fell due, both *John W.* and *Joshua W.* became bankrupts, and the price of cochineal had fallen so much in the market, that *F.* and Co. afterwards sold it for not a third of the price at which *John W.* had bought it, and they then proved for the deficiency under *John W.*'s commission. Held, that they had also a right to prove the amount of the two bills under *Joshua W.*'s commission, without deducting the proceeds arising from the sale of the cochineal. *Ex parte Bonham*, 1833. 3 Dea. & Chit. 285.

Upon a sale of the bankrupt's mortgaged property, made under the general order, the Court of Review has jurisdiction to enforce a specific performance of the contract by the purchaser. *Ex parte Sidebotham*, 3 Dea. & Chit. 818; S. C. 1 Mont. & Ayr. 655.

A purchaser, who in the full knowledge of certain objections to the title, grants a lease of the pro-

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perty to a third party, must be taken to have waived the objections to the title. *Ibid.*

An assignment by a trader of his whole stock, with intent to abscond from his creditors, and carry off the purchase money, is not an act of bankruptcy, when the purchaser pays a fair price for the goods, and is ignorant of the trader's design. *Baxter v. Pritchard*, 1834. 1 Adol. & Ellis, 456; S. C. 3 Nev. & Man. 638.

A sale of the whole of a trader's property is not, of itself, an act of bankruptcy. The party who seeks to treat the sale as an act of bankruptcy, must show some fact from which fraud may be inferred. *Rose v. Haycock*, 1827. 1 Adol. & Ellis, 460, n.

A bankrupt made a purchase of timber by two agreements, one before and one after the act of bankruptcy, and after the act of bankruptcy received part of the timber without paying for it, but was not entitled to receive the remainder without giving security for the whole. After the act of bankruptcy the defendant became security, and purchased from the bankrupt the benefit of the contract; which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant that he the bankrupt would pay the money due to the vendor for the timber purchased by the first agreement, and in part re-

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ceived, and should be entitled to retain the timber so purchased. The bankrupt then delivered money and bills to the defendant to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them; and afterwards paid the amount of the cash and of the bills to the vendor, by a single draft on those bankers. After this the commission issued:—Held, that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for the defendant was the mere agent of the vendor, and neither the cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a *bond fide* one, protected by 6 Geo. 4. c. 16. s. 82. *Shaw v. Batley*, 1833. 4 Barn. & Ad. 801; S. C. 1 N. & M. 751.

VICE-CHANCELLOR.

A previous order of the Vice-Chancellor, which had been omitted to be drawn up, ordered to be entered *nunc pro tunc*, if the Vice-Chancellor should think fit. *Ex parte Lewis*, 1833. 3 Dea. & Chit. 198.

VIVA VOCE EXAMINATION.

An application to examine *viva voce* should be made before the petition is heard on affidavit. *Ex parte Baldwin, re Smith*, 1834. 1 M. & A. 617; *Ex parte Arnsby*, 2 Dea. & Chit. 120, and *Anon.* 2 Dea. & Chit.

140, corrected. Application will be granted if a sufficient case is made out.

When a petition stands over to have a *viva voce* examination, that side begins with whom the affirmative lies. *Ex parte Daly*, 1834. 1 M. & A. 384.

It seems that a party may depose *viva voce* to having been served. *Ex parte Tull, re Davis*, 1833. 1 M. & A. 225.

VOLUNTARY TRANSFER, &c.

See also FRAUDULENT ASSIGNMENT AND PREFERENCE.

A party who seeks to avoid payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must shew, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy. *Morgan v. Brundrett*, 1833. 5 Barn. & Adol. 289.

WARRANT OF COMMITMENT.

Where a warrant is issued against a bankrupt for non-compliance with an order of the Court, and the warrant is lost, the Court will renew the warrant or grant a copy of it, as a matter of course. *Ex parte Giles*, 1834. 3 Dea. & Chit. 620.

A bankrupt having been committed by one of the London Commissioners to the custody of the messenger, for not answering satisfactorily, was brought up before two Commissioners, and committed by

them to Newgate:—Held, that the commitment was illegal, inasmuch as the bankrupt ought to have been brought up, and re-examined before a Subdivision Court, consisting of three Commissioners, who must be all present at such re-examination, though they need not be unanimous in the sentence of commitment. On an application for a bankrupt's discharge by habeas corpus, an affidavit may be read, stating circumstances which are not set forth in the warrant of the Commissioners. *Ex parte Lampon*, 1834. 3 Dea. & Ch. 751; S. C. 1 M. & A. 245.

A recital on a warrant that the party was "suspected to have obtained part of the bankrupt's goods by means of fictitious sales," is not objectionable. *Ex parte Bardwell, re Venables*, 1834. 1 M. & A. 200.

The warrant need not set out the precise answers with which the Commissioners were dissatisfied. *Ex parte Bardwell, re Venables*, 1834. 1 M. & A. 202.

· WAIVER.

A formal objection to a notice of motion is waived by the party appearing, and requesting further time to oppose it. *Ex parte Morland*, 1833. 3 Dea. & Ch. 248.

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account. The intestate died in 1801, and

a commission issued against the bankers in 1810, notwithstanding which the same partner continued to receive the dividends and pay them to the intestate's widow, up to the period of his own death, which happened in 1822; some time after which the assignees of the bankers claimed a lien on the debenture for a debt due from the intestate to the banking house:—Held, that after so long an abandonment of any claim of lien the assignees could not now support such claim, and that the debenture also could not be considered as having been left in the order and disposition of the bankers, having been deposited in the nature of a trust. *Ex parte Douglas*, 1833. 3 Dea. & Chit. 310.

An application for security for costs must be made, before any step is taken by the party applying. *Ex parte Tull, re Davis*, 1833. 3 Dea. & Ch. 503; S. C. 1 M. & A. 80.

Although a fiat is concerted for the purpose of defeating an action brought by a creditor against the bankrupt for the recovery of his debt, yet where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the Court will dismiss the petition. *Ex parte Mills, re Colman*, 1834. 3 Dea. & Chit. 606; S. C. 1 M. & A. 310.

Upon a sale of the bankrupt's mortgaged property made under the general order, the Court of Review has jurisdiction to enforce a specific

performance of the contract by the purchase. *Ex parte Sidebotham*, 3 Dea. & Chit. 818; S. C. 1 Mont. & Ayr. 655.

A purchaser who, in the full knowledge of certain objections to the title, grants a lease of the property to a third party, must be taken to have waived the objection to the title. *Ibid.*

WITNESS.

Competency.

On a petition by creditors to supersede, on the ground of fraudu-

lent collusion between the petitioning creditor and the bankrupt, the bankrupt's affidavit detailing the particulars of the fraud is admissible in evidence. *Ex parte Arnsby*, 1833. 3 Dea. & Ch. 10.

On a *viâ voce* examination on a petition to supersede, a creditor is not a competent witness. *Ex parte Lavender*, 1834. 1 M. & A. 702.

The evidence of a bankrupt, which in one respect is in his own favour, but in another respect against himself, is receivable. *Smith v. Biggs*, 1832. 5 Sim. 391.

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